153 U.S.

153-628

RECORD, CASE No 14,803.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 591.

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED AUGUST 13, 1891.

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1 In the Supreme Court of the United States, October Term, 1891.

NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY (Plaintiff in Error) *vs.* COMMONWEALTH OF PENNSYLVANIA. } No. —.

Surwrit of error by New York, Lake Erie & Western Railroad Company to the supreme court of Pennsylvania.

Assignment of Errors.

I. The learned court erred in not sustaining the company's fifth exception to the decision of the court of common pleas of Dauphin county, viz:

"The learned court erred in not finding as a conclusion of law that the act of June 30, 1885, and particularly the fourth section thereof, is unconstitutional and void because in conflict with article V of the amendments to the Constitution of the United States, which provides that 'no person shall be * * * deprived of life, liberty, or property without due process of law.'"

II. The learned court erred in not sustaining the company's sixth exception to the decision of the court of common pleas of Dauphin county, viz:

"The court erred in not finding as a conclusion of law that the act of June 30, 1885, and particularly the fourth section thereof, is unconstitutional and void because in conflict with section 1 of article XIV of the amendments to the Constitution of the United States, which provides that 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, *nor* property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'"

2 III. The learned court erred in not sustaining the company's seventh exception to the decision of the court of common pleas of Dauphin county, viz:

"The court erred in not finding as a conclusion of law that the act of June 30, 1885, impairs the obligation of the charter contract between the company and the State of New York, in pursuance of which its bonds and mortgages were issued, and is therefore void because in conflict with section 10 of article I of the Constitution of the United States, which forbids any State to pass any law 'impairing the obligation of contracts.'"

IV. The learned court erred in not sustaining the company's eighth exception to the decision of the court of common pleas of Dauphin county, viz:

"The court erred in not finding as a conclusion of law that the act of June 30, 1885, impairs the obligation of the contract con-

tained in the legislation of the State of Pennsylvania, in pursuance of which the railroad of said company was constructed through a portion of said State, and is therefore void because in conflict with section 10 of article I of the Constitution of the United States."

V. The learned court erred in not sustaining the company's ninth exception to the decision of the court of common pleas of Dauphin county, viz:

"The court erred in not finding as a conclusion of law that the act of June 30, 1885, impairs the obligation of the contract between the company and its creditors, and is therefore void because in conflict with section 10 of article I of the Constitution of the United States."

VI. The learned court erred in not sustaining the company's tenth exception to the decision of the court of common pleas of Dauphin county, viz:

"The court erred in not finding as a conclusion of law that it is not within the constitutional authority of the State of Pennsylvania to impose upon a corporation of the State of New York or upon its treasurer, being a resident of the State of New York, the duty of assessing in the State of New York a tax upon bonds and mortgages issued and sold in the State of New York upon the payment of interest made in the city of New York, nor to hold the said company nor its treasurer responsible for failure so to assess and deduct the same from interest paid upon said bonds and mortgages in the city and State of New York, and the act of June 30, 1885, if it shall be construed to authorize the account settled by the auditor
3 general in this case or any part thereof, is void because in violation of a necessary implication of the Constitution of the United States, which confines the power of each State to tax subjects within its territorial sovereignty, and by reason of which all subjects over which the sovereign power of a State does not extend are exempt from taxation or control by said State."

VII. The learned court erred in not sustaining the company's eleventh exception to the decision of the court of common pleas of Dauphin county, viz:

"The learned court erred in not holding that, in so far as it applies to the New York, Lake Erie & Western Railroad Company, the fourth section of the act of June 30, 1885, is unconstitutional and void because in conflict with that provision of the Constitution of the United States which confers upon Congress the power 'to regulate commerce with foreign nations and among the several States and with the Indian tribes.'"

VIII. The learned court erred in not sustaining the company's twelfth exception to the decision of the court of common pleas of Dauphin county, viz:

"The learned court erred in not holding as a conclusion of law that, in so far as it requires the corporation to deduct from the amount due upon a coupon owned or presented by one person the tax due upon the bond from which said coupon has been detached, the said bond belonging to a different person, the act of June 30, 1885, is unconstitutional and void, because impa-ring the obligation

of the contract between the corporation and the holder of the coupon, and therefore in conflict with section 10 of article I of the Constitution of the United States."

IX. The learned court erred in affirming the judgment of the court of common pleas of Dauphin county in favor of the Commonwealth of Pennsylvania and against the New York, Lake Erie & Western Railroad Company.

X. The learned court erred in not reversing the judgment of the court of common pleas of Dauphin county.

To the honorable the judges of the Supreme Court of the United States of America:

4 Your petitioner prays for a reversal of the judgment entered against it in the supreme court of Pennsylvania for the reasons assigned above.

THE NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY,
By its Attorney, M. E. OLMSTED.

5 [Endorsed:] In U. S. Supreme Court. New York, Lake Erie and Western Railroad Co. (plaintiff in error) *vs.* Commonwealth of Pennsylvania. Assignment of errors. M. E. Olmsted.

6 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the supreme court of the State of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The New York, Lake Erie and Western Railroad Company, plaintiff in error, and The Commonwealth of Pennsylvania, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a

7 treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, we, being willing that error, if any

hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date reof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 22nd day of July, in the year of our Lord one thousand eight hundred and ninety-one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOSEPH P. BRADLEY,
Asso. Justice of Sup. Ct. U. S.

8 [Endorsed:] Filed in supreme court, middle district, Aug. 6, 1891.

9 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Commonwealth of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Pennsylvania, wherein The New York, Lake Erie & Western Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 22nd day of July, in the year of our Lord one thousand eight hundred and ninety-one.

JOSEPH P. BRADLEY,
Asso. Justice Sup. Ct. U. S.

10 [Endorsed:] New York, Lake Erie and Western Railroad Co. (plaintiff in error) *vs.* Commonwealth of Pennsylvania. Citation. Filed in supreme court, middle district, Aug 6, 1891.

On this fifth day of August, in the year of our Lord one thousand eight hundred and ninety-one, personally appeared A. C. Stamm before me, the subscriber, prothonotary of the supreme court of

Pennsylvania, for the middle district thereof, and makes oath that he delivered a true copy of the within citation to James S. Stranahan, deputy attorney general of the Commonwealth of Pennsylvania, August 5, 1891.

A. C. STAMM.

[Seal of the Supreme Court of Pennsylvania, Middle District, 1776.]

Sworn to and subscribed before me the day and year aforesaid.

WILLIAM PEARSON,
Prothonotary Supreme Court of Penna., Middle District.

11 The answer of the justices of the supreme court of the State of Pennsylvania to the writ of error from the Supreme Court of the United States, hereunto annexed, as follows, to wit:

Copy of Appearance Docket Entry.

Among the records and proceedings enrolled in the court of common pleas in and for the county of Dauphin, in the Commonwealth of Pennsylvania, to No. 81, Jan. term, 1890, is contained the following:

In Common Pleas of Dauphin County, Jan. Term, 1890.

COMMONWEALTH OF PENNSYLVANIA
vs.
NEW YORK, LAKE ERIE & WESTERN RAILROAD CO. } No. —.

Kirkpatrick, Olmsted.

Appeal from settlement by the State treasurer and auditor general.

1889, October 4.—Appeal and specifications of objection filed.
1889, October 29.—Bond approved and filed.
1889, November 14.—*Narr.* and copy of account filed.
1890, November 25.—Stipulation to try without jury filed.
1890, December 18.—Depositions of A. R. Macdonough and Edward White filed.
1890, December 18.—Notes of testimony filed.
1890, December 18.—Opinion and finding of the court filed, deciding that there is due the Commonwealth by the defendant the sum of twenty-nine hundred and ninety-four dollars and eighty-two cents ($2,994.82) and costs.
1891, January 2.—Commonwealth's exceptions filed.
1891, January 9.—Defendant's exceptions filed.
1891, March 31.—Exceptions overruled or considered immaterial, and judgment entered in accordance with opinion heretofore filed. See opinion filed.
1891, April 15.—Certiorari surappeal, No. 21, May T., 1891, from supreme court, received and filed.

1891, April 16.—Certiorari surappeal, No. 34, May T., 1891, from supreme court, received and filed.

Certified.

[Seal of C. P. of Dauphin County.]

WM. H. ULRICH,
Prothonotary.

Judgment of the Court.

This case having been tried without a jury, under the act of April 22, 1874, the court directed judgment to be entered as follows:

Tax, three mills on $841,000	$2,523 00
Interest at 12 per cent. from October 15, 1889, to December 17, 1890	355 57
Attorney general's commission at 5 per cent	116 25
Total	$2,994 82

12 *Account.*

New York, Lake Erie and Western Railroad Company, in account with the Commonwealth of Pennsylvania, Dr.

For tax on scrip, bonds, and certificates of indebtedness, per section four of the act of June 30, 1885, for the year ending first Monday of November, 1888, as per report herewith filed.

Nominal value of scrip, bonds and certificates of indebtedness owned by residents of Pennsylvania	$78,573,485 10	
Tax, three mills		$235,719 46
Deduct treasurer's commission		1,228 60
Due Commonwealth		$234,490 86

TREASURY DEPARTMENT OF PENNSYLVANIA,
HARRISBURG, PA., *August* 15, 1889.

Approved:
(Signed) W. LIVSEY,
For W. B. HART,
State Treasurer.

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, PA., *August* 8, 1889.

Settled and entered:
(Signed) JOHN A. GLENN,
For THOMAS McCAMANT,
Auditor General.

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, *August* 22, 1889.

I hereby certify, that the above is a true copy of the original remaining on file in this department.

Witness my hand and the seal of office, the day and year aforesaid.

[SEAL.] (Signed) JOHN A. GLENN,
For THOMAS McCAMANT,
Auditor General.

13 *Appeal.*

In the matter of the account for tax on loans and bonded indebtedness for the year ending with the first Monday in November, 1888, amounting to $234,490.86, settled against the New York, Lake Erie and Western Railroad Company by the auditor general of Pennsylvania upon the eighth day of August, 1889, and approved by the State treasurer upon the fifteenth day of August, 1889.

The said New York, Lake Erie and Western Railroad Company hereby appeals from said settlement of account to the court of common pleas of Dauphin county, and, together with a copy of said account, files the following specifications of objections thereto, agreeably to the provisions of the act of assembly in such case made and provided:

1. The fourth section of the act of June 30, 1885, does not impose any duties or liabilities upon corporations in respect of any tax upon bonds or mortgages issued by them, but applies only to persons who act in the capacity of treasurers of corporations; and there is no warrant nor authority of law for the settlement of the account hereby appealed from against the corporation appellant.

2. The tax to which bonds and mortgages are made subject by the act of June 30, 1885, is an annual tax upon the actual value thereof; and before any tax can lawfully be due upon any bond or mortgage, there must have been a legal assessment or ascertainment of its value, with notice to the owner and the right of appeal. The loans of the company appellant bear different rates of interest and differ in market and in actual values. Neither the company nor its officers were authorized by law to make any valuation or assessment of its bonds for taxation, nor were they furnished with any such valuation or assessment made by any properly constituted authority. Neither the company nor its officers, therefore, could lawfully have deducted any tax from any interest paid dur-
14 ing or for the year, or any part thereof, for which the tax is charged.

3. If the act of June 30, 1885, requires that the company, or the treasurer thereof, when paying interest to its creditors, shall retain from them a so-called tax upon bonds which had not been assessed and valued by lawful authority, or makes the company or the treasurer thereof liable unto the Commonwealth for failure to collect said

so-called tax, then the said act is unconstitutional and void, because in conflict with article V of the amendments to the Constitution of the United States, which provides that "no person shall be * * deprived of life, liberty or property without due process of law." And also because in conflict with section 1 of article XIV of the amendments to the Constitution of the United States.

4. The said act of assembly is void, also, because in conflict with section 9 of article I of the constitution of Pennsylvania, which provides that no person shall be "deprived of his life, liberty or property unless by the judgment of his peers or the law of the land."

5. The said act of assembly is void, also, because in conflict with section 10 of article I of the constitution of Pennsylvania, which provides that private property shall not be taken for public use without due authority of law.

6. The act of June 30, 1885, so far as it relates to the taxation of the bonds, mortgages or other loans of the company appellant, or requires the said corporation, or the treasurer thereof, to deduct any tax when paying interest thereon, is incomplete, inoperative, unconstitutional and void, the said act failing to provide any means for the assessment of said bonds, mortgages and loans, or for ascertaining their value or the amount of tax to be deducted from the interest paid.

7. If the act of June 30, 1885, does not require an assessment or valuation of bonds and mortgages owing by corporations, but requires the treasurers of corporations to calculate the tax at three mills upon the nominal, regardless of the real, value of said bonds and mortgages, which bonds and mortgages, as in the case of this corporation, differ in real and in market values, and to retain the tax so calculated from the interest paid to the holders of said bonds and mortgages, then the said act is in conflict with section 1 of article IX of the constitution of Pennsylvania, which requires that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." For the same reason the said act of June 30, 1885, is also void, because in conflict with section 1 of article XIV of the amendments to the Constitution of the United States.

8. The act of June 30, 1885, and other acts of assembly relating to the taxation of moneys at interest, require that bonds and mortgages owing by natural persons, and shares of stock in banks and other corporations, shall be taxed at their actual value. If the said acts, or any of them, require that bonds and mortgages owing by corporations shall be taxed in a different manner, that is to say, upon their nominal value regardless of their real value, then the said act or acts are void because in conflict with section 1 of article IX of the constitution of Pennsylvania, which requires that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax;" and also because in conflict with section 1 of article XIV of the amendments to the Constitution of the United States.

9. The act of June 30, 1885, in so far as it requires the company

appellant, or the treasurer thereof, to deduct from the interest due to its bondholders a tax which has not been lawfully assessed, impairs the obligation of the contract between the said company and its creditors, and is void because in conflict with section 10 of article I of the Constitution of the United States, which forbids any State passing any law impairing the obligation of contracts.

10. The charter granted to the corporation appellant neither requires nor permits the said corporation to act as a collector of State taxes, and so much of the act of June 30, 1885, as imposes upon it additional burdens by requiring it to collect, or become responsible for, the taxes due by other corporations and individuals, its creditors, is in violation of section 10 of article I of the Constitution of the United States, which forbids any State passing any law impairing the obligation of contracts, and is, therefore, void.

11. In the settlement of account hereby appealed from, the company is charged with tax at the rate of three mills, calculated upon the nominal value of the bonds themselves, whereas the only tax required by the fourth section of the act of June 30, 1885, to be deducted or collected by corporations, or the treasurers thereof, is "three mills on every dollar of the interest paid."

12. In the settlement of account hereby appealed from, tax to the amount of $235,719.46 is charged upon $78,573,485.10 of bonds, none of which are known, or can be ascertained, to be held, or to have been held or owned, at any time during the year 1888, by residents of Pennsylvania. The State cannot lawfully impose a tax upon property, persons or business not within her jurisdiction. The act of June 30, 1885, cannot be construed to require the company, or the treasurer thereof, to retain a tax from interest paid upon bonds save such only as are held by residents of Pennsylvania. Or if it can, it is void because in conflict with section 10 of article I of the Constitution of the United States, as impairing the obligation of contracts. And the State of Pennsylvania, having forced, or attempted to force, upon the company an obligation to act as tax-collector not provided for in its charter, cannot, in any event, hold the company responsible for failure to collect a tax upon bonds until it shall be shown that said bonds are taxable by reason of their ownership within the State.

13. Tax to the amount of $—— is charged upon $—— of bonds held in trust for persons whose residence is unknown, which charge of tax is illegal and void for the reasons mentioned in the specification last above.

14. Tax to the amount of $—— is charged upon $—— of bonds issued and owing by this company, but held and owned by other corporations, whereas the act of June 30, 1885, does not tax bonds and mortgages held by corporations, but only bonds, mortgages and other moneyed capital "in the hands of individual citizens of the State."

15. Tax to the amount of $—— is charged upon $—— of bonds issued and owing by the corporation appellant, but owned by other corporations, which other corporations are liable to pay, and do

pay, a tax upon the capital stock of said corporations whereby said bonds are represented, and it was not the intention of the act of June 30, 1885, to impose double taxation in respect of said bonds.

16. Tax to the amount of $—— is charged upon $—— of
17 bonds issued and owing by the corporation appellant, but owned by banks and other corporations which, having paid the tax of six mills upon their capital stock, are, by the third section of the act of June 10, 1881, and the third section of the act of June 30, 1885, exempt from taxation upon so much of their shares, capital and profits as is not invested in real estate.

17. Tax to the amount of $—— is charged upon $—— of bonds issued and owing by the corporation appellant but owned by other corporations, which are liable to pay, and do pay, a tax under the tenth section of the act of June 7, 1879, to which the act of June 30, 1885, is a supplement, and are not taxable on, or in respect of, bonds and mortgages owned by them.

18. Tax to the amount of $—— is charged upon $—— of bonds issued and owing by the corporation appellant, but owned by corporations whose property is not taxable under the laws of Pennsylvania.

19. $—— of the indebtedness of the corporation appellant is evidenced by bonds which have attached to them coupons representing the interest from time to time accruing, which coupons are payable to bearer and are detachable from said bonds and are separate and distinct contracts possessing all the attributes of commercial paper, the title to which passes by delivery, and the same may be owned, and often are owned, when presented for payment, by persons other than those who own the bonds to which they were originally attached; and if the act of June 30, 1885, requires the company to withhold from persons owning and presenting the coupons a tax due upon bonds owned by other persons, then the said act impairs the obligation of the contract between the company and the owner of the coupon, and is in conflict with section 10 of article I of the Constitution of the United States, and is, therefore, void.

20. Tax to the amount of $—— is charged for an entire year upon $—— bonds upon which no interest was paid during the period for which the tax is charged. No tax upon said bonds could, therefore, have been deducted, retained or collected by
18 the company, or the treasurer thereof, and neither the company nor its treasurer can be held responsible for taxes which it could not have collected.

21. The act of June 30, 1885, does not tax the corporation appellant in respect of its indebtedness, and neither the company nor its treasurer having deducted, collected or retained any tax upon, or in respect of, bonds owing by said company, the interest thereon having been paid in full, it is not possessed of any moneys belonging to the Commonwealth, and is not bound to pay the whole, or any part, of the amount wherewith it stands charged in said settlement.

22. The New York, Lake Erie and Western Railroad Company is not a corporation of the State of Pennsylvania, but is a corporation

of, and located in, the State of New York, having its principal office and place of business in the city of New York in said State, from which State alone it derives its corporate existence, and in which State, namely, in the city of New York, all of its bonded indebtedness was contracted and the bonds actually issued and sold, and are payable, principal and interest; and the said interest is there actually paid to persons there doing business. The said company has no right, under its charter, to assume the duties of an assessor or collector of taxes for the State of Pennsylvania, neither is it competent or legal for the State to impose such duties upon said company; and the act of June 30, 1885, if it requires that this company, or the treasurer thereof, shall, in paying interest in the State of New York, retain any part of the interest stipulated to be paid to the holders of its bonds, impairs the obligation of the charter contract between the State of New York and the said company, and also the obligation of the contract between said company and the owners of its bonds; and is, therefore, void, because repugnant to paragraph 1 of section 10 of article I of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts.

NEW YORK, LAKE ERIE AND
WESTERN R. R. CO.,
(Signed) By its attorney, M. E. OLMSTED.

Harrisburg, Pa., September 28, 1889.

19 *Report.*

OFFICE OF THE
NEW YORK, LAKE ERIE AND WESTERN R. R. COMPANY,
NEW YORK, *November*, 1888.

To the auditor general of Pennsylvania:

SIR: The annexed report, of which you will please consider this letter part, is made in deference to the wishes of the auditor general and in a blank form prescribed by him, but under protest, and not in admission of any authority contained in the fourth section of the act of June 30, 1885.

The said act, as this company is advised, does not require any assessment of bonds to be included in the return made to the auditor general; and the return is, in fact, only a statement of the amount of the indebtedness of the company, with the proportions thereof held by residents and non-residents respectively.

The bonds of the company are of various issues, differing in security for the payment of the principal, and in the length of time for which they are to run, in the rate of interest which they bear, and consequently in market value and in actual value, which, as to many of them, differ largely from their nominal value. Many of them sell daily in the public market for less than their par value.

This company is advised that no tax is or can be lawfully due upon a bond until there has been an ascertainment of its actual value by some competent authority, with notice to the owner of the bond and the right of appeal from the valuation. Neither the company nor any of its officers are authorized by law to appraise or value the bonds for purposes of taxation; neither have we been furnished with any appraisement or valuation made by any properly constituted authority.

20 This company is a corporation of, and located in, the State of New York, from which State alone it derives its corporate existence, in which State, namely, in the city of New York, all of its bonded indebtedness was contracted and is payable, principal and interest; and the said interest is there actually paid to persons there doing business. The said company has no right under its charter to assume the duties of an assessor or collector of taxes for the State of Pennsylvania; neither is it competent or legal for the said State to impose such duties upon said company; and the act of June 30, 1885, if it requires that this company shall, in paying interest in the State of New York, retain any part of the interest stipulated to be paid to the holders of its bonds, impairs the obligation of the charter contract between the State of New York and the said company, and also the obligation of the contract between said company and the owners of the bonds; and is, therefore, void, because in conflict with paragraph one of section ten of article I of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts.

The officers of the company do not know that any of its bonds are owned in Pennsylvania. They have reason to believe and do believe that nearly all of the same are owned by non-residents of Pennsylvania. The interest upon all of the said indebtedness is paid in the city of New York to the persons presenting the coupons, largely messengers of banks doing business in said city, and so far as any inference can be drawn from the manner in which, or the persons by whom, said interest is collected, such inference is that all the said loans and bonded indebtedness are owned by non-residents of Pennsylvania.

For these reasons and others no tax has been deducted from any interest paid upon any of the loans of this company maturing during the period covered by this report, but the same has been paid in full without any deduction whatever.

This company denies the validity of the act of June 30, 1885, in so far as it attempts to force said company or its officers to

21 act as assessors or collectors of State taxes, and protests against being held liable for any tax upon or in respect of its indebtedness.

Very respectfully,

(Signed) EDWARD WHITE, *Treasurer.*

Detailed Statement Attached to Report.

Bonds.	When due.	Amount.
First-mortgage coupon bonds, 7 per cent.....	May 1 and Nov. 1..	$71,000 00
First-mortgage bonds, 3 per cent.....	May 1 and Nov. 1..	2,411,000 00
Second-mortgage bonds, 5 per cent	Mar. 1 and Sept. 1..	2,149,000 00
Third-mortgage bonds, 4½ per cent.....	Mar. 1 and Sept. 1..	4,618,000 00
Fourth-mortgage bonds, 5 per cent.....	Apr. 1 and Oct. 1...	2,926,000 00
Fifth-mortgage bonds, 4 per cent	June 1 and Dec. 1..	709,000 00
Buff. branch mortgage bonds, 7 per cent.....	Jan. 1 and July 1...	182,600 00
First consol. mortgage bonds, 7 per cent.....	Mar. 1 and Sept. 1..	16,690,000 00
First consol. funded coupon bonds, 7 per cent	Mar. 1 and Sept. 1..	3,705,977 10
Second consol. mortgage-bonds, 6 per cent....	June 1 and Dec. 1..	25,000,000 00
Second consol. funded coupon bonds,6 per cent	June 1 and Dec. 1..	8,597,400 00
Reorganization first-lien bonds, 6 per cent....	May 1 and Nov. 1..	2,500,000 00
Collateral trust-bonds, 6 per cent.....	May 1 and Nov. 1..	4,273,000 00
Funded coupon bonds of 1885, 5 per cent.....	June 1 and Dec. 1..	4,032,000 00
Income bonds.....	Dependent upon earnings.....	508,008 00
Total	.....	$78,573,435 10

OFFICE OF THE
NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY,
21 CORTLANDT ST., NEW YORK, *November*, 1888.

To the auditor general of Pennsylvania:

In accordance with the provisions of the fourth section of the act of June 30, 1885, and the requirements of your department, as treasurer of —— —— Company, I make the following report of the indebtedness of said company for the year ending first Monday of November, 1888:

22 Nominal value of all scrip, bonds and evidences of indebtedness..... *$78,573,485 10

Nominal value of all scrip, bonds and evidences of indebtedness known to be owned by residents of Pennsylvania..... None.

Nominal value of all scrip, bonds and evidences of indebtedness none of which are known to be owned by residents of Pennsylvania..... $78,573,485 10

(Signed) EDWARD WHITE, *Treasurer.*

STATE OF NEW YORK, }
County of New York, } *ss:*

On this 4th day of November, A. D. 1888, personally appeared before me, a notary public in and for the county aforesaid, Edward White, treasurer of the New York, Lake Erie and Western Railroad Company, who, being duly sworn according to law, did depose

* See detailed statement attached.

and say that the foregoing report of indebtedness (of which the accompanying protest is to be considered part), with the amounts owned by residents and non-residents of Pennsylvania, as nearly as the same can be ascertained, is correct and true.

(Signed) EDWARD WHITE, *Treasurer.*

Sworn and subscribed before me, the day and year aforesaid.

[SEAL.] GEO. E. GRANT,
Notary Public, New York City and County.

23 *Bond on Appeal.*

Know all men by these presents that we, the New York, Lake Erie & Western Railroad Company and American Surety Company of New York, are held and firmly bound unto the Commonwealth of Pennsylvania in the sum of twenty-five thousand dollars ($25,000), lawful money of the United States of America, to be paid to the said Commonwealth of Pennsylvania or her certain attorney or assigns; to which payment, well and truly to be made, we do bind ourselves and each of us, our heirs, executors, administrators, and successors, firmly by these presents.

Sealed with our seals and the corporate seal of said company and dated the 21 day of October, A. D. 1889.

Whereas the above-bounden New York, Lake Erie & Western Railroad Company has entered in the office of the auditor general of Pennsylvania an appeal to the court of common pleas of Dauphin county from the settlement of an account for tax on loans, amounting to two hundred and thirty-four thousand four hundred and ninety $\frac{86}{100}$ dollars ($234,490.86), made by the auditor general on the 8th day of August and approved by the State treasurer on the 15th day of August, 1889:

Now, the condition of this obligation is such that if the said New York, Lake Erie & Western Railroad Company shall prosecute its said appeal with effect and pay all costs or charges which the court or arbitrators having jurisdiction to hear and determine said appeal shall award, and also pay any sum of money which shall appear by the judgment of the court or award of arbitrators to be due upon said account to the Commonwealth of Pennsylvania, then this obligation to be void and of none effect, or otherwise to be and remain in full force and virtue.

NEW YORK, LAKE ERIE & WESTERN
R. R. COMPANY,
By JOHN KING, *President.*

Attest:

[Seal of N. Y., L. E. & W. R. R. Company.]

A. R. MACDONOUGH, *Secretary.*

AMERICAN SURETY CO. OF NEW YORK, [SEAL.]
By W. D. TRENHOLM, *President.* [SEAL.]

[Seal of American Surety Company.]

FRED. F. NUGENT, *Secretary.*

Signed, sealed, and delivered in presence of—
H. G. HINTON.

The security of the above bond is approved.

(Must be signed by a judge of some court in county where sureties reside.)

GEORGE P. ANDREWS,
Justice of Supreme Court of the State of New York.

OCT. 29, 1889.

The security of the within bond approved.
By the court:

J. W. SIMONTON, *P. J.*

24 *Narr.*

In Dauphin Common Pleas, No. 81, Jan. Term, 1890.

DAUPHIN COUNTY, *ss:*

The Commonwealth of Pennsylvania, by her attorney general, complains of the New York, Lake Erie & Western Railroad Company of a plea that they render unto the said Commonwealth the sum of one hundred thousand dollars, lawful money of the United States, which they owe to and unjustly detain from her, for that whereas the said defendants on the 15th day of August, A. D. 1889, at the county of Dauphin aforesaid, were indebted to the said plaintiff in the sum of two hundred and thirty-four thousand four hundred and ninety $\frac{86}{100}$ dollars, lawful money of the United States, on an account examined, adjusted, settled, and signed by the auditor general and State treasurer of this Commonwealth and duly entered in the books of their respective offices, as authorized and required by law, on the day and year last aforesaid, in which a certain sum of money, to wit, the sum last aforesaid, is due and owing the said plaintiff from the said defendants, with interest thereon at the rate of twelve per centum per annum from and after the expiration of sixty days from the day upon which the said account was so as aforesaid examined, adjusted, settled, and signed by the auditor general and State treasurer of this Commonwealth for tax on scrip, bonds, and certificates of indebtedness per act of June 30th, 1885, for the year ending 1st Monday of November, 1888, a copy of which said account was thereafter sent by the said auditor general, under his hand and seal of office, to the said defendants and which yet remains in full force against the said defendants and — appealed from. Whereby and by force of the statute in such case made and provided an action hath accrued to the said plaintiff to demand and have of and from the said defendants a certain sum of money, to wit, the sum mentioned and ascertained to be due to this Commonwealth in the said account so as aforesaid examined, adjusted, settled, and signed by the auditor general and State treasurer of this Commonwealth, parcel of the said sum above demanded, with interest and other legal charges; and being so indebted the said defendants afterwards, to wit, on the day and year aforesaid, at the county aforesaid, promised to pay to the said plaintiff, on request, the said last-mentioned sum of money.

And whereas also the said defendants, on the day and year in the first count first mentioned, at the county aforesaid, were indebted to the said plaintiff in a certain further sum of money, to wit, the sum mentioned and ascertained to be due to this Commonwealth in the said account in the first count mentioned, for money then and there had and received by the said defendants to and for the
25 use of the said plaintiff; and also a certain further sum of money, to wit, the sum last aforesaid, on an account settled and entered by the auditor general and State treasurer of this Commonwealth against the said defendants, on the day and year in the first count mentioned, for tax on scrip, bonds, and certificates of indebtedness.

And whereas afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, the said defendants, in consideration of the premises, promised to pay the two last-mentioned several sums of money respectively to the said plaintiff on request, yet the said defendants have disregarded their said promises, and although often requested so to do have not as yet paid any of the said several sums of money or any part thereof, to the damage of the said plaintiff of one hundred thousand dollars, and therefore she brings suit, &c.

JOHN F. SANDERSON,
Deputy Attorney General.

26 & 27 A. Form 9.

Account.

New York, Lake Erie & Western Railroad Co. in account with the Commonwealth of Pennsylvania, Dr.

For tax on scrip, bonds, and certificates of indebtedness per section four of the act of June 30, 1885, for the year ending first Monday of November, 1888, as per report herewith filed.

Nominal value of scrip, bonds, and certificates of indebtedness owned by residents of Pennsylvania.	$78,573,485 10	
Tax, three mills		$235,719 46
Deduct treasurer's commission		1,228 60
Due Commonwealth		$234,490 86

Interest at 12 per centum from 60 days after date of settlement. Remit to State treasurer.

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, PA., *Aug.* 8, 1889.

Settled and entered.

JOHN A. GLENN,
FOR THOMAS McCAMANT,
Auditor General.

TREASURY DEPARTMENT OF PA.,
HARRISBURG, PA., *Aug.* 15, 1889.

Approved.

WM. LIVSEY
For WM. H. HART,
State Treasurer.

AUDITOR GENERAL'S OFFICE,
HARRISBURG, *Oct.* 4, 1889.

I hereby certify that the above is a true copy of the original remaining on file in this department.

Witness my hand and the seal of office the day and year aforesaid.

JOHN A. GLENN,
For THOMAS McCAMANT,
Auditor General.

[Seal of the Auditor General.]

28 *Stipulation to Try without Jury.*

In the Court of Common Pleas of Dauphin County.

COMMONWEALTH OF PENNSYLVANIA
vs.
NEW YORK, LAKE ERIE & WESTERN R. R. Co. } No. 81. Jan. Term, 1890.

It is hereby agreed that a trial by jury be dispensed with in the above-stated case, and that the same be submitted to the decision of the court to be heard and determined under the provisions of an act entitled "An act to provide for the submission of civil cases to the decision of the court and to dispense with trial by jury," approved the 22d day of April, 1874, subject, however, to a writ of error as in other cases, at the option of either party.

Nov. 25, 1890.

W. S. KIRKPATRICK,
Attorney General.
M. E. OLMSTED,
Attorney for Defendant.

29 *Depositions of A. R. Macdonough and Edward White.*

COMMONWEALTH OF PENNSYLVANIA
vs.
THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY. } In the Court of Common Pleas of Dauphin County. No. 81. January Term, 1890.

Depositions taken by agreement before George E. Grant, notary public, at 21 Cortlandt street, New York, November 15th, 1890, to be read upon the trial of the case with like effect as if taken under a rule of court.

Appearances: For the Commonwealth, John F. Sanderson, deputy attorney general. For the defendant, M. E. Olmsted.

A. R. MACDONOUGH called and sworn.

Examined by Mr. OLMSTED:

Q. Mr. Macdonough, where do you reside?

A. In the city of New York.

Q. What official relation, if any, do you sustain to the New York, Lake Erie and Western Railroad Company?

A. I am its secretary.

Q. How long have you occupied that position?

A. Since the organization of the company in April, 1878.

Q. Can you state briefly in what manner the company was organized—the present corporation?

A. The Erie Railway Company having defaulted in payment of interest upon certain of its mortgage bonds, an action of foreclosure was instituted under which the sale of the franchises and property of said Erie Railway Company was made, which were bought in by a purchasing committee and by them again transferred to certain persons who organized the New York, Lake Erie and Western Railroad Company, under the authority of the statutes of the State of New York, directing the mode of such reorganization of companies sold under foreclosures.

Q. Do you remember how the Erie Railway Company was formed?

A. The Erie Railway Company was organized under similar circumstances in the year 1861, upon the sale of the property and franchises of the New York and Erie Railroad Company.

Q. And, to go a little further back, what of the New York and Erie Railroad Company?

A. The New York and Erie Railroad Company was originally chartered in 1832, and remained until its foreclosure.

Q. Chartered by the——

A. Chartered by an act of the legislature of New York.

Q. Where is the general office of The New York, Lake Erie and Western Railroad Company, the defendant?

A. No. 21 Cortland street, in the city of New York.

Q. Can you state what different loans it has now outstanding, or rather had in the year 1888?

A. The bonded indebtedness of the New York, Lake Erie and Western Railroad Company consisted of first-mortgage coupon bonds, 7 per cent., $71,000 in amount, first-mortgage bonds $2,411,000.

Q. There seems to be two items of first-mortgage bonds there. Where they issued by the present corporation?

A. They were issued by the New York and Erie Railroad Company.

Q. Do you know where those bonds were issued and sold?

A. In this city.

Q. In New York?

A. In the city of New York.

Q. Do you know whether or not any of them were held in the year 1888 by residents of the State of Pennsylvania?

A. It may be that a few of them are registered in our bond registers as held at that time by residents of the State of Pennsylvania.

Q. Can you state the circumstances under which those first-mortgage bonds were issued?

A. They were issued under the authority of the statute of the State of New York which empowered this company to create a lien upon its property to the extent of $3,000,000 and to issue
31 bonds under the directions of an agent of the State, the proceeds of which should be expended in the construction of the road under the like direction.

Q. Did not the company originally owe the State some money?

A. That was the form in which the indebtedness to the State arose. The credit of the State was loaned to the company to the extent of $3,000,000.

Q. And this mortgage was given for the purpose of reimbursing the State for that——

A. Securing the lien of the State upon the property of the company to that extent.

Q. I understand from the report of Mr. White and from what you said, that something less than the full $3,000,000 is outstanding?

A. The balance has been converted into issues of a later date.

Q. Have been converted into other bonds which appear in other loans?

A. In other loans of the company.

Q. This report of Mr. White to the auditor general shows (15) fifteen different items of loans. Can you state what ones of those were issued by the original New York and Erie Railroad Company?

A. There were issued by the original company classes of bonds known as first-mortgage, first-mortgage coupon, second-mortgage, third-mortgage, fourth-mortgage and fifth-mortgage bonds.

Q. What are the amounts of them, respectively, of those outstanding in 1888?

A. Of the first-mortgage coupon bonds $71,000, of the first-mortgage bonds $2,411,000, of the second-mortgage bonds $2,149,000, of the third-mortgage bonds $4,618,000, of the fourth-mortgage bonds $2,926,000, and of the fifth-mortgage bonds $709,000.

Q. Now, is what you have stated as to the place of issue and sale of the first-mortgage bonds true as to all of those five items?

A. It applies equally to all the mortgage bonds issued by the New York and Erie Railroad Company.

Q. They were all sold——

32 A. All sold, so far as I know, so far as the record shows; all sold in the city of New York.

Q. And they were originally sold any of them to residents of the State of Pennsylvania?

A. Not to my knowledge. Not as anything appears on our record to show that they were.

Q. So far as the records disclose, they were all sold to non-residents of Pennsylvania?

A. They were all sold to residents of the State of New York.

Q. Now, this item of Buffalo Branch mortgage bonds, $182,000,

which is the next item appearing in Mr. White's report to the auditor general; what are they and where were they issued?

A. They were bonds which were assumed by this company, by the New York and Lake Erie Railroad Company, the payment of them guaranteed, and they were issued and sold in the State of New York.

Q. Were any of them sold to residents of Pennsylvania?

A. The record of them shows none of them to have been sold to any other than residents of New York city.

Q. And you know of none of them having been sold originally to residents of Pennsylvania?

A. I do not know. I was not then connected with the company.

Q. You have no such knowledge?

A. I have no such knowledge, and the records of the company do not show that any were so sold, except to residents of the city of New York.

Q. The first consolidated mortgage bonds of $16,690,000 appear as the next item in Mr. White's report to the auditor general. Where were they issued and sold and to whom?

A. They were issued and sold by the Erie Railway Company in the city of New York, and so far as I am aware, and so far as any record shows, they were sold to residents of the city of New York.

Q. Now, the first consolidated funded coupon bonds, $3,705,977.10, by what company were they issued and where and to whom?

A. The first consolidated funded coupon bonds were issued
33 by the present company, the New York, Lake Erie and Western Railroad Company, to secure overdue coupons of the first consolidated mortgage bonds. They were issued in the city of New York and sold, so far as I am aware, to residents of the city.

Q. This item of second consolidated mortgage bonds, $25,000,000, by what company were they issued, where, and to whom?

A. They were issued by the New York, Lake Erie and Western Railroad Company at the time of its organization. They were issued in the city of New York and in London and sold both in this city and in London.

Q. Were any of them originally sold, so far as you know and the records of the company disclose, to residents of Pennsylvania?

A. They were not.

Q. The second consolidated funded coupon bonds, $8,597,400, they were issued by the present company?

A. Yes; by the present company; issued under the same conditions as the first consolidated coupon bonds. They represent the unpaid coupons on the second consolidated.

Q. And were any of them issued to residents of Pennsylvania so far as you know?

A. Not so far as the records show or my knowledge goes.

Q. Reorganization first-lien bonds, $2,500,000?

A. Those bonds were created and issued by the present company, and were issued in the city of New York. So far as the records of

them show and my knowledge goes, none were issued to others than residents of the city of New York.

Q. Collateral trust bonds, $4,273,000?

A. Those were created and issued by the present company and were all sold or taken by residents of this city. They were sold in a block.

Q. Funded coupon bonds of 1885, $4,032,000, what about them?

A. They were issued in 1885 to fund coupons in arrear upon former bonds—upon the second consolidated bonds. They were issued to the holders of the second consolidated bonds who presented them at that date, in 1885, wherever those holders
34 might reside. It is possible that some of them were issued to holders of bonds resident in Pennsylvania, but the great bulk of them were issued to residents of New York city and London.

Q. Income bonds, $508,008; what of them?

A. They were all created and issued by the present corporation at the time of its organization, in the city of New York, and sold in the city of New York to residents, so far as I am acquainted with the facts, residents of the city—in London; some of them were sold in London.

Q. That makes the total indebtedness of the company for the year 1888, $78,573,485.10, I believe?

A. That appears to be the total indebtedness for the year 1888, of the Erie Company.

Q. Now, was interest paid upon all of those bonds in 1888?

A. Upon all of them.

Q. Where was the interest paid?

A. Interest was paid at the treasury of this company, No. 21 Courtlandt street, New York city.

Q. Any of it paid in London?

A. Partly in London. Mostly at the treasury of the company in this city and partly at the agency of the company in London. The company has an agency for the payment of interest in London.

Q. London, England?

A. Yes; London, England.

Q. Have these bonds, since they were originally issued in New York, become somewhat scattered over the country so far as you know?

A. Scattered over this country and throughout Europe.

Q. Have you any registration of the bonds, or any of them, and if so, what sort of a registry do you keep?

A. There is a registration kept in my office as secretary, of the bonds issued by this company, of two kinds—the registration of the holders of the bonds for the purpose of showing the ownership, and a separate registration—what is known as a voting register.

Q. Let me ask you, are the holders of those bonds entitled to vote?

A. The holders of all the bonds of the company are entitled to vote.

35 Q. For what do they vote?

A. They vote for the election of directors at the rate of one vote for each $100 of bonds held.

Q. When you say that the holders of the bonds are entitled to one vote for each $100 of bonds, do you mean to confine that statement to the bonds actually issued by the present organization, or to all of the indebtedness issued or assumed by it, to the entire $78,000,000?

A. The right to vote is conferred by the articles of association of the company upon the holders of all the bonds issued or assumed by the present company, and it has assumed explicitly the payment of all of the bonds of the previous companies.

Q. Then all of the loans covered by this report of Mr. White——

A. The holders of the bonds under all the loans reported by Mr. White to the State of Pennsylvania for the year 1888 are entitled to vote in the manner stated.

Q. Now, you spoke of a registration for voting purposes; what sort of a registration is that? Does it necessarily show the residence of the owners of the bonds?

A. The voting registry shows simply the title to vote in the person presenting and holding the bond.

Q. Let me ask you one question further: What is the method of ascertaining the ownership of these bonds for the purpose of voting? When you hold an election how does the owner of a bond establish his right to vote?

A. The voting register is opened sixty days prior to the election and closed thirty days prior. During those thirty days any person desiring to vote and being a holder of a bond, produces the bond and has his name registered in the voting register as a holder.

Q. Then does he register his residence at the same time?

A. Not necessarily.

Q. Simply his name and the amount of bonds he holds, and the fact that he exhibits the bonds is sufficient evidence to entitle him to vote?

A. His right to be entered on the voting register.

Q. When is the annual election held?

A. On the last Tuesday of November in each year.

36 Q. Have you the voting register for 1888?

A. I have it here.

Q. Have you made an examination of it for the purpose of ascertaining, as far as possible, the residences of the parties who voted?

A. I have carefully examined the registers for 1888 with that view.

Q. Can you give us the result of your examination?

A. In 1888 there were registered on the voting register the names of the holders of $28,562,700 worth of bonds and there were entered on the voting register for 1888 of bonds held by residents of Pennsylvania $338,000 worth.

Q. That is, of these $28,562,700, $338,000 were entered as owned by residents of Pennsylvania?

A. Yes.

Q. Were any of those $338,000 entered by corporations, or were they all by individuals?

A. By individuals on the voting register.

Q. And out of the entire $78,000,000 of loans, the total registry for voting purposes for that year was, as you have stated, $28,562,700, and of that only $338,000 was registered in the names of residents of Pennsylvania?

A. Yes.

Q. You spoke of another register—the register of ownership?

A. There is a register of the ownership of bonds in which the holders of bonds who desire to have them registered do so.

Q. That is the ordinary bond registry without reference to voting?

A. Yes, sir.

Q. How many of your bonds were so registered in 1888?

A. $11,124,300.

Q. What amount of those were registered in the names of residents of Pennsylvania?

A. In 1888 the amount of bonds registered not for voting purposes owned by Pennsylvanians was $2,054,000.

Q. Were any of those registered in the names of corporations?

A. Yes, quite a number of them were registered in the names of corporations.

37 Q. Can you give the names of the corporations and the amount in each instance?

A. First National Bank of Pittston, Pennsylvania, had registered $85,000 of bonds; Miners' Savings Bank of Honesdale, Pennsylvania, had registered $50,000; Philadelphia Savings Fund Society of Philadelphia had registered $1,000,000; the Children's Hospital of Philadelphia had registered $25,000; the Beneficial Savings Fund Society of Philadelphia had registered $50,000; the president and directors of the Insurance Company of North America had registered $200,000; the Provident Life and Trust Company of Philadelphia had registered $3,000; the Pennsylvania Company for Insurances on Lives and Granting Annuities, trustees, had registered $10,000; the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, trustees, had registered $10,000; the Hospital of the Protestant Episcopal Church of Philadelphia had $9,000; the Insurance Company of North America, of Philadelphia, had registered $40,000; Wyoming National Bank of Wilkes-Barre had registered $30,000; Wayne County Savings Bank of Honesdale had registered $29,000; the White Haven Savings Bank of White Haven, had registered $10,000. Those are all the corporation registers.

Q. Can you tell me, Mr. Macdonough, whether any part of the $338,000 registered for voting purposes by residents of Pennsylvania were included in the register of ownership which you have given us?

A. The bonds on the voting register held by Pennsylvanians are not included in this total of registered bonds owned by residents of Pennsylvania.

Q. Then those two items together, the $338,000 and $2,054,000

are all the bonds shown by both your registers as standing in the names of residents of Pennsylvania in 1888?

A. The sum of those amounts, being $2,392,900, makes up all the bonds held by residents of Pennsylvania in 1888, whether as owners or voters.

Q. Do you know, or have you any reason to believe, Mr. Macdonough, that any other bonds were held by residents of Pennsylvania in that year?

A. I have no means of ascertaining whether or not that was the case, and no reason to think it was the case.

38 Q. You have no personal knowledge and the records of the company do not show that any others were held by residents of Pennsylvania?

A. Neither.

Q. The election, I think, you said occurred about the middle of November?

A. The last Tuesday of November.

Q. And the registry must be made within sixty days prior thereto?

A. The register is opened sixty days and closed thirty days prior to the date of the election.

Q. Then, at the time of the payment of interest of these various bonds in March, April, June, January, September and December that register is not in existence. For instance, when the interest was paid upon the Buffalo Branch mortgage bonds, or any other bonds on the first of January, 1888, that registry for voting purposes for 1888 had not been made?

A. No. I could answer more briefly. The voting register exists only from a date sixty days previous to the election, which date falls in September, to a time thirty days previous, or to the election itself. It exists only during that period from sixty days prior to the annual election, from about the twentieth or twenty-fifth of September to the twentieth or twenty-fifth of November.

Q. Then, at the time of payment of interest at these various interest periods, was it possible for any officer of the company to know—first, in what manner do the coupons usually come to the company? Are they presented to it by the holders of the bonds, or in what manner do they come to the company for payment?

A. I can only answer that from what I hear from Mr. White.

Q. You don't pay the interest?

A. No.

Q. When you gave the amount of $338,000 registered for voting purposes by residents of Pennsylvania, that was the total amount registered of the whole $78,000,000 of indebtedness in the names of residents of Pennsylvania?

A. That was the full amount of the whole indebtedness.

Q. And the $2,054,000 registered in the ordinary manner,

39 the register of ownership, that included all that were registered of these various items of bonds making up the total of $78,000,000?

A. None other than those that are given were registered in the names of residents of Pennsylvania.

Cross-examination.

By Mr. SANDERSON:

Q. Certain rights were conferred upon the New York and Erie Railroad Company by special legislation of Pennsylvania, were they not?

A. They were.

Q. Which rights are now exercised by the New York, Lake Erie and Western Railroad Company?

A. Yes, sir.

Q. A portion of the road passes through Pennsylvania?

A. It does.

(It is agreed that any special legislation enacted by the legislature of Pennsylvania in favor of the New York and Erie Railroad Company, the Erie Railway Company or the New York, Lake Erie and Western Railroad Company may be referred to on trial.)

Q. What are your official duties, or what have they been with reference to loans other than those issued in the first instance by the New York, Lake Erie and Western Railroad Company?

A. Merely the keeping of the registers, which I have explained, as to those bonds.

Q. The other loans were signed by you as secretary—and the bonds were signed by you as secretary?

A. The bonds were signed by me.

Q. You caused the seal of the company to be affixed?

A. Yes.

Q. And then delivered them to the treasurer for sale?

A. Yes.

Q. Beyond that you had no connection with the sale of them?

A. None.

Q. And your knowledge as to the sales of all of the loans you have mentioned is merely casual and hearsay?

A. No, I can hardly say that. The method of disposing of
40 all of these bonds is generally discussed in committees of the board, and I was present at those discussions, and I had knowledge of what was proposed to be done in regard to these issues.

Q. Anything further officially?

(No response.)

Q. The voting register does not show the residence of the holders who had registered for voting purposes?

A. It does not.

Q. And no inquiry is made at the time of registration as to the residence of such holders?

A. None at all.

(By Mr. OLMSTED:)

Q. Need a man who presents a bond necessarily be the owner of it in order to vote upon it?

A. On the contrary they are ordinarily presented by persons holding proxys to vote.

(By Mr. OLMSTED:)

Q. If A should borrow bonds of B and present them to the company, and they were registered in the name of A, A would then vote upon them?

A. A would vote upon them.

(By Mr. OLMSTED:)

Q. And the name of B, the real owner——

A. Would not appear at all in the voting register.

(By Mr. SANDERSON:)

Q. In other words you register the name of the actual holder without reference to the nature of his ownership?

A. In the voting register.

(By Mr. SANDERSON:)

Q. And without inquiry as to the nature of his ownership?

A. Yes, sir.

(By Mr. SANDERSON:)

Q. And without inquiry as to his residence or the residence of any one whom he may represent?

A. We pay no attention to that at all. No inquiry about it.

(By Mr. SANDERSON:)

Q. What does the register of ownership other than for voting purposes show as to residences?

A. The register of ownership shows the residence of persons presenting bonds for registry.

(By Mr. SANDERSON:)

Q. Does the registered owner retain his coupon bonds, or what does he receive?

41 A. He merely brings in his bond, has it registered in his name and takes it away again.

Q. Is it stamped?

A. No. It is endorsed as registered in his name; endorsed by the transfer agent as registered in his name.

Q. What is required when such a bond is transferred to another one?

A. It is then endorsed, transferred to the second one, the transferee, or it may be endorsed and transferred to bearer, and then it becomes a bearer unregistered obligation.

Q. And such endorsement is necessary in order to enable a subsequent holder to receive the interest upon such a registered bond?

A. Yes.

Q. In giving the names of the registered owners, then, you have to refer to the register and thus ascertain the residence of such?

A. Exactly.

Q. How have you ascertained the residence of the voting registered holders?

A. By finding upon the register of owners the names of certain persons who have presented their bonds for registry for voting.

Q. Which names you recognize as being residents of Pennsylvania?

A. Yes.

Q. As a matter of information personal to yourself?

A. Yes.

Q. What relation does the State of New York sustain at this time to the early loans of the New York and Erie Railroad Company?

A. The liens of the State were relinquished upon the completion of the road. It has now no interest in the bonds.

Q. The loan of credit mentioned has ceased?

A. Yes.

Q. The register of ownership and the voting register are in your official charge?

A. They are in my official charge.

Q. Are any other books with reference to the bonds in your charge?

42 A. Only the transfer books that attend the register.

(By Mr. OLMSTED:)

Q. Where is the railroad of the New York, Lake Erie and Western Railroad Company—between what points?

A. It is chartered to run between Piermont and Dunkirk. It actually does run between New York city and Buffalo. It passes through the State of Pennsylvania at two points.

Q. What is the entire length of the road?

A. Four hundred and forty-six miles.

Q. Where does it enter the State of Pennsylvania?

A. Near Port Jervis and leaves that State again at Lackawaxen—about thirty miles. It passes through the State again for a short distance in the neighborhood of Susquehanna, in Susquehanna county.

(By Mr. OLMSTED:)

Q. It was built through there to avoid engineering difficulties?

A. Built to avoid engineering difficulties in the State of New York.

Q. Do you know whether it pays anything to the State of Pennsylvania for the right of way through that State?

A. I do.

Q. How much?

A. $10,000 a year.

EDWARD WHITE, called and affirmed.

Examined by Mr. OLMSTED:

Q. Mr. White, you are the treasurer, I believe, of the defendant

corporation, The New York, Lake Erie and Western Railroad Company?

A. Yes, sir.

Q. Where is your office?

A. 21 Cortlandt street, New York.

Q. Where is the interest upon the bonded indebtedness of the company paid?

A. It is paid at my office.

Q. Will you state in what manner the interest is paid; in what manner it is collected by the holders of the bonds?

A. The coupons are presented at my office, and they are paid on presentation.

43 Q. Are they usually presented by the owners of the bonds themselves?

A. No, sir, I judge not.

Q. In what manner do they come to you; from what source?

A. They mostly are presented by the messengers of banks and bankers in the city.

Q. Messengers of banks and bankers in the city of New York?

A. Yes, sir.

Q. Were any coupons presented at your office for payment in 1888 by residents of the State of Pennsylvania?

A. I cannot say that there were any.

Q. Is the register of bonds for voting purposes, and also the register of the ownership of bonds, connected with your office?

A. No, sir.

Q. By whom is it kept?

A. In the secretary's office.

Q. Mr. Macdonough's office?

A. Yes, sir.

Q. He has testified here that in 1888 there were registered for voting purposes $338,000 of bonds in the names of persons which are ascertained to be residents of Pennsylvania, and $2,054,000 registered in the ownership register in the names of residents of Pennsylvania, some held by individuals and others by corporations. Do you know, of your own knowledge, or from any record in our office, or from any source whatever, of the ownership of any other bonds by residents of Pennsylvania; I mean any other bonds issued by your company, or upon which your company pays interest?

A. No, sir.

Q. The company pays annually to the State treasurer of Pennsylvania the $10,000 required by the statute of that State for right of way——

A. Yes, sir.

Q. —of its railroad through a portion of that State?

A. Yes, sir.

Q. It also pays taxes upon its capital stock and gross receipts to the extent of its business in that State?

A. Yes, sir.

44 (By Mr. SANDERSON:)

Q. Do you make or cause to be made any inquiry as to who are the holders of the bonds when interest is paid?

A. No, we could not do that.

(By Mr. OLMSTED:)

Q. The total indebtedness of the company, as reported by you is, in round numbers, $78,000,000. What is the usual denomination of the bonds?

A. Mostly $1,000. There are some $500 bonds.

Q. Then there are at least 78,000 different bonds?

A. Yes, sir.

Q. None of them are over $1,000?

A. None over a $1,000 and there are some of $500.

Q. How many $500 bonds would you say?

A. Well, I cannot give you the exact figures. I should judge perhaps between $2,000,000 and $3,000,000.

Q. So there would be in round numbers 78,000 bonds?

A. Yes.

Q. And the interest is payable semi-annually?

A. Yes, sir.

Q. That would make 160,000 coupons?

A. Yes, 160,000 coupons.

Q. Do those coupons usually come in at the interest periods in great numbers?

A. I estimate that we have paid as high as 20,000 coupons in a day.

Q. What would you say as to the possibility of your ascertaining the ownership of the bonds from which those 20,000 coupons were cut?

A. I should say it would be impossible, entirely impracticable to do it. I think the parties presenting them would decline to take the trouble to give us the information, and would demand the money for the coupons due, and, if they were not paid, would protest them.

Q. Could you make any sort of an investigation without stopping the payment of the interest entirely until you had completed it?

A. It would block the payment.

Q. Block the payment of the interest on the entire loan?

A. Yes.

45 Q. How long have you been treasurer of the company, Mr. White?

A. Since January, 1885.

Q. Prior to that time what was your occupation?

A. I was connected with a bank in New York city.

Q. Did that bank ever collect coupons?

A. Oh, yes, in large quantities.

Q. From your experience as a banker will you state what is the ordinary method of collecting coupons from large corporations whose offices are in New York city? I mean, does the bank own

the bonds from which the coupons are cut, or where does the bank get the coupons?

A. The coupons are received from all over the country—from the correspondents of the banks sent in with other collections to be made and the proceeds passed to the credit of the respective parties who send them in. These coupons are taken from the letters and assorted, the different kinds together, and sent out by messengers to be collected.

Q. Then does the New York bank know, ordinarily, the name or residence of the owner of the bond from which the coupon has been cut?

A. It only knows the bank or banker who sends it to them.

Q. Then, of course, the messenger of the New York bank when he presents the coupon at the office, knows still less?

A. He only knows that he holds the coupon and wants to get the money for it.

Q. Suppose the holder of a bond lived in Dunkirk, New York, what would be his ordinary method of collecting the interest if he held a bond of this company?

A. He would be very likely to deposit the coupon with his Dunkirk bank, the Dunkirk bank would forward that coupon, with any others it might have, to its correspondent in New York, and that correspondent would present the coupons for payment at the office of the company.

Q. In the banking business is it customary for, say the Dunkirk bank, or a bank in any other part of the country, to state the name, and residence of the owner of the bond?

A. No, they simply send us so many coupons of a certain kind for collection.

Q. Have you any reason to believe that any large amount
46 of bonds of this company are held abroad, in other countries?

A. Yes, sir.

Q. What leads you to that conclusion?

A. Because coupons are presented in quite large quantities by foreign banking-houses in the city, and, about the time of the payment of coupons, on steamer days, on the arrival of steamers, we look for quite an amount of coupons from such bankers.

Q. The company has no agency in the State of Pennsylvania for the payment of interest?

A. No; the coupons are paid here in New York.

Q. Has it any agency in London?

A. Some coupons are paid at a London bank.

Q. And forwarded by that bank here to you?

A. Yes, sir.

Q. But you have no agency in Pennsylvania?

A. No, sir; London and New York are the points, and very few, comparatively very few, are paid in London.

Q. Are the bonds listed on the New York stock exchange?

A. Yes, sir.

Q. Are they listed on the Philadelphia stock exchange?

A. I can't say as to that.

Q. Well, they could not be listed without the action of the company. Don't you know whether the company has taken any such action?

A. Not to my knowledge. That would be done through the secretary's office.

Q. Do you know the prices for which these various issues of bonds sold in 1888 at the New York stock exchange?

A. No, I can't say that I do. It is easy to ascertain that from the records of sales.

Q. Did they all sell at the same price, do you know?

A. No, different issues had different prices.

Q. The income bonds, for instance, what is the ruling price for them in the market?

A. I do not know what they are worth, but considerably below par, while the first consolidated bonds are considerably above par.

Q. One hundred and forty at least?

A. In that vicinity, I think.

47 Q. The income bonds sold at about seventy-five cents on the dollar?

A. Well, I don't know whether they sold as high as that.

Cross-examined.

By Mr. SANDERSON:

Q. You do not mean to be understood that there are 160,000 different holders of the bonds of your company, but only that there are about so many bonds?

A. Did I state anything to that effect? We were stating the number of bonds.

Q. But not the number of holders?

A. No.

Q. The number of different holders is vastly less?

A. It would be supposed so.

Q. Many holders hold large amounts?

A. Possibly so; that varies undoubtedly from year to year.

Q. And some of them hold them permanently from year to year?

A. I presume so.

Q. Have you any knowledge as to who any of the large holders are?

A. The only knowledge that I would have would be from the register of the bonds, and that information is in the secretary's office.

Q. Have you made any inquiry, or tried in any way, to inform yourself as to who the holders are?

A. No, sir.

(By Mr. OLMSTED:)

Q. Except that you know from Mr. Macdonough's examination of his register?

A. Oh, yes.

(It is admitted that Mr. Macdonough, if recalled, would testify that the bonds have never been listed or sold upon the Philadelphia stock exchange.)

48 *Stenographer's Notes.*

Tried before the Honorable J. W. Simonton, president judge, and the Honorable J. B. McPherson, additional law judge, without a jury, at Harrisburg, Tuesday, November 25, 1890.

Appearances: Commonwealth, Hon. W. S. Kirkpatrick, attorney general; Hon. Jno. F. Sanderson, deputy attorney general. Defendant, M. E. Olmsted, Esq.

Reported and transcribed in pursuance of the act of assembly, approved May 24, 1887.

EDGAR S. KING,
Official Stenographer.

49 Stipulation for trial without a jury.

Mr. KIRKPATRICK: The Commonwealth offers in evidence the settlement and report in this case.

Mr. OLMSTED: The defendant offers in evidence the certificate of incorporation of the New York, Lake Erie and Western Railroad Company.

Also, an act of the General Assembly of New York, passed April 24, 1832, entitled "An act to incorporate the New York and Lake Erie Railroad Company," found in the laws of that State on page 402.

Also, an act of the General Assembly of New York, entitled "An act relating to the foreclosure and sale of the New York and Lake Erie Railroad Company," passed April 24, 1860, found on page 253.

Also, an act passed April 2, 1861, entitled "An act in addition to an act relating to the foreclosure and sale of the New York and Lake Erie Railroad Company."

Also, the certificate of the secretary of the Commonwealth of Pennsylvania, showing the registration in that office, as required by the Pennsylvania statute of 1874, of the office of the company in Pennsylvania and the appointment of an agent to do business in that State.

Also the deposition of A. R. McDonald, secretary of the New York, Lake Erie and Western Railroad Company.

Also, the deposition of Edward White, the treasurer of the company.

I now offer to prove by the report of the auditor general for 1888 that certain of the corporations named in these depositions as having bonds of this company registered in their ownership, paid to the State the six-mill tax upon the par value of their capital stock, which exempts them from this taxation. The banks which paid are the First National Bank of Pittston, Wyoming National Bank of

Wilkes Barre, Wayne County Savings Bank of Honesdale and White Haven Savings Bank of White Haven.

50 *Opinion of the Court of Common Pleas.*

COMMONWEALTH OF PENNSYLVANIA *vs.* NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY. } In the Court of Common Pleas of Dauphin County. No. 81, January Term, 1890.

Appeal from settlement of auditor general and State treasurer.

By the COURT:

This case was tried, by agreement of the parties, without a jury, as provided by the act of April 22, 1874. From the evidence we find the following

Facts.

1. Defendant is a corporation, chartered by the State of New York, and having its principal office and place of business in the city of New York. It has and exercises the right of way, under a special act of the legislature of the State of Pennsylvania, to run its railroad for somewhat more than thirty miles through the State of Pennsylvania, for which it pays annually to the State the sum of ten thousand dollars.

2. The settlement appealed from is based upon a report made by the treasurer of defendant to the auditor general of Pennsylvania for the year 1888, which contains a detailed statement of the several issues of bonds, scrip and certificates of indebtedness by defendant and the corporation whose successor it is, amounting in all to $78,573,485.10, in which it is stated that none of the indebtedness is known to be owned by residents of Pennsylvania, and that it is believed by the officers of the company that nearly all is owned by non-residents of Pennsylvania.

3. In the settlement appealed from defendant is charged with tax upon the nominal value of all the scrip, bonds and certificates of indebtedness issued by it and the corporation whose successor it is, and owing by it, amounting to the sum of $78,573,485.10 as stated in said report.

51 4. All the evidences of indebtedness owing by defendant were created and issued under authority granted by the legislature of the State of New York, and were issued, sold and delivered in the city of New York, in said State, or in London, England, and the interest accruing from time to time thereon is payable and paid in said city of New York and in London. The right to the interest is evidenced by coupons payable to bearer, which, when due, are separated from the bonds and are presented for payment at the office of defendant in the city of New York by banks, bankers and their messengers on behalf of themselves and their correspondents in other places, by whom the coupons have been transmitted, either as cash or for collection; and it is practically impossible for the treasurer or

other officers of defendant, at the time the coupons are presented, to ascertain the residence of the owner of the bonds from which they have been separated, because of the large number of coupons presented at the dates when they become due, the whole number of coupons due semi-annually amounting to more than one hundred and fifty thousand, and as many as twenty thousand being presented in a single day; and for the further reason, that the bankers and their messengers, when they present the coupons, in very many instances do not know who are the owners of the bonds from which they have been detached, and could not be compelled to disclose if they did know, as the coupons are payable to bearer; and a refusal of the treasurer of the company to pay the coupons on presentation, except upon condition of the ownership being disclosed, would subject it to the risk and expense and loss of credit of having the coupons protested for non-payment.

Some of the evidences of indebt-ness are coupon bonds issued and payable to bearer, and others are coupon bonds which may be registered or not at the option of the holders or owners.

5. Holders of the evidences of indebtedness of defendant are entitled to vote for directors of this company, and a register is kept in the office of defendant, in which all holders of such evidences of indebtedness are required to register between sixty and thirty days prior to any election for directors at which they desire to
52 vote. The register for the year 1888, shows an ownership of bonds to the amount of $28,562,700.00, of which we find that $338,000.00 were owned by residents of Pennsylvania, but this ownership does not appear on the register.

6. A record of registered bonds is also kept in the office of defendant, and in 1888 there were registered $11,124,300.00 in value of bonds. Of this amount $2,054,000.00 were owned by residents of Pennsylvania, $1,551,000.00 of which were owned by Pennsylvania corporations, leaving $503,000.00 which were owned by individual residents of Pennsylvania.

7. There is no evidence in this case from which we could find that any particular bonds, other than those which make up the two amounts of $338,000.00 and $503,000.00 as above stated, were held or owned, during the year 1888, in Pennsylvania; nor is there any evidence tending to show that the treasurer of defendant, at the time the coupons were paid, could know that any, and if any which, of the coupons, other than those which belonged to the bonds above specified, belonged to bonds held or owned in this State; and we, therefore, do not find that there were any other bonds, or any greater amount of bonds, held in Pennsylvania, during the year for which the tax is claimed in this settlement, than the bonds specified in findings of fact numbers five and six.

Discussion.

As we have stated in the findings of fact, the settlement appealed from charged defendant with tax upon the nominal value of its whole indebtedness. We do not, however, understand the learned

attorney general to claim that defendant should be held for tax upon the whole amount. His argument, if we rightly apprehend it, is that in some sense the burden of proof is upon the defendant, to this extent at least: That as the register of voters shows that out of $28,562,700.00 in nominal value of bonds, $338,000.00 in value are owned by residents of Pennsylvania, the court ought to presume that if all were registered for voting, the same proportion would hold, and, therefore, that defendant should be charged with tax upon the resulting proportion of the whole amount of its indebtedness.

And, further, that as the record of registered bonds shows
53 that of $11,124,300.00 in nominal value, $2,054,000.00 are held by residents of Pennsylvania, the result of the same process of apportionment should be applied.

It is to be noted, however, that of the $2,054,000.00, shown by the record of registered bonds to be held by residents of Pennsylvania, $1,551,000.00 are held by Pennsylvania corporations, and are, therefore, not taxable, so that this registry shows only a taxable Pennsylvania ownership of $503,000.00.

But the question of the existence of taxable property is not a question of proportion. Only bonds held in Pennsylvania are taxable. The act of 1885, under which this tax is claimed, makes it the duty of the treasurer of defendant to assess and retain the tax when payment of interest is made on all such bonds, and to report the amount thereof "as nearly as the same can be ascertained;" and if he fails to perform this duty, the defendant is liable for the tax which he has thus failed to retain; but the act nowhere makes the defendant liable to pay tax on bonds not held or owned in the State because it has failed in its duty with respect to those so held. The utmost liability it can incur is to pay the tax on such bonds as are owned in the State, with the penalty for failure to retain and report, where this is charged in the settlement. And, therefore, before this liability can be imposed, the particular bonds, and not merely the amount of bonds so held, must be in some legal manner ascertained.

The argument of the learned attorney general leaves wholly out of view this most important element of the case, that the duty and the right to retain the amount of the tax, on payment of the interest, is a duty and a right which attaches to each individual bond and its coupon, and not to the bonds and coupons in the mass. That is to say, it is not the duty of the treasurer, and he has not the right, to deduct the tax from any given coupon, unless the bond, with the corresponding number to which that coupon belonged, is held in Pennsylvania. Hence, even if he knew that, say $100,000.00 in amount of the bonds were held within the State, he could not legally deduct the tax from any of the coupons presented for payment, unless they belonged to the particular bonds so held.

Therefore, if we were to hold the defendant liable to any
54 part of the tax claimed in this settlement, on the inference or presumption that some of the bonds are held in Pennsylvania, without proof which particular bonds are so held, we should

require it to pay to the State a tax which it could not possibly retain or collect from the bondholders upon whom, and not upon the defendant, the tax is imposed. This would be such a monstrous injustice, and so entirely unwarranted by any fair construction of the act, that we cannot possibly so hold.

In Commonwealth *v.* Lehigh Valley Railroad Company, 140 April term, 1881, the learned Judge Pearson, late president of this court, said of a like argument:

"It is urged, however, that the company must at its peril find out the residence of its debtor, and deduct it from his interest, if of this State. If the bonds had to be presented in order to obtain the interest, there might be something in this argument, but as it need not be, and, in point of fact, never is, but it is always collected through the coupons, the company officers have no means of finding the residence of the creditor, and the latter no interest in making it known. The State has undertaken to force upon the corporation a duty not required by its charter, that it shall become a tax-collector, and if to find out the creditor, under the penalty of paying the tax itself, it is one of no small peril. If the company refuses to pay the coupon without deducting the tax, the holder may have it protested and the legislature has provided no means to compel the holder to answer for his residence or ownership. It is in effect imposing the tax on the debtor instead of the creditor where the law intended to place it."

In the same case he said further:

"In trying causes between the State and corporations, we must be governed by the same rules of law and evidence which prevail between individuals. The party on whom rests the burden of proof must make out a case. We are asked without a particle of evidence to presume that this railroad company has over $5,000,000 borrowed at interest from citizens of Pennsylvania, when all that is proved to be so borrowed is $222,266.66. It is as well settled as any other legal principle that our State cannot tax money at interest unless due and owing to citizens of this State. That it is so due is not to be presumed, must be proved and is not proved here."

And in Commonwealth *v.* Pittsburgh, Fort Wayne and Chicago Railway Co., 74 Pa. St., 83, Chief Justice Agnew said, p. 94:

"In regard to the facts, the causes of the Commonwealth
55 must be tried according to the same rules of evidence which apply to other suitors, she must supply the evidence of them, and, if by loss or want of evidence she fails, the misfortune or the fault is her own. The absence of evidence cannot be supplied by presumptions at war with justice as well as with the ordinary rules of evidence."

The injustice of holding the defendant liable for the tax without proof that the bonds are held in this State, as well as the difficulty of ascertaining the residence of the holders of the bonds, is illustrated by the case of Hinchman *v.* Philadelphia and Reading R. R. Co., 5 C. C. Rep., 632, where it was held by Mr. Justice Mitchell, then sitting in the common pleas, in an action for interest on certificates of loan against the corporation whose duty it is to retain the tax from

the interest, that the plaintiffs were not bound to aver in their statement of claim, nor to prove that they were non-residents of the State, in order to escape the retention by the defendant of the three mills tax imposed by the act of June 30, 1885; and that the company must aver in its affidavit of defense, and prove on the trial, that the holder of the bonds upon which the interest was claimed was a resident of Pennsylvania in order to recoup the amount of the tax.

This was, of course, merely applying the general principle that a party setting up an affirmative defense must prove it, but it pointedly shows how impossible it is for the treasurer of defendant to ascertain the residence of the bondholder, for not only can he not compel it to be disclosed when the coupons are presented for payment, even if it be known by the banker or other person who presents them, but if he claim to withhold the tax and an action is brought upon the coupons, even in a court of the State, the owner, who, of course, knows his own residence, is not bound to plead or to prove it, but the defendant must do so, or, if he have deducted the tax, he cannot have credit for it. We cannot believe that it was the intention of the legislature to impose such a burden upon corporations when they were made collectors of this tax.

The attorney general has cited the opinion of this court in the Commonwealth *v.* Manor Gas Coal Co., No. 37 Sept. term, 1888, Dauphin county common pleas, decided March 14, 1890, in which we said on the facts there found:

56 "The treasurer having refused or neglected to perform the duties" (imposed by the act of 1885), "we think the burden of proof is upon the defendant, and as it is not shown that any of the evidences of indebtedness are held by non-residents, we must assume that they are all held by residents."

But there is a marked difference between the facts in that case and in this. There the defendant was a local Pennsylvania coal company having an indebtedness of $170,500.00 secured by mortgage upon its real estate; here it is a New York corporation owning and operating a railroad extending from the city of New York to Buffalo, with an indebtedness of over seventy-eight million dollars. There the defendant's bonds had all been issued and sold in Pennsylvania; here they were all issued and sold outside of the State of Pennsylvania, and some of them in London, England. There the defendant had not, up to the time of the trial, made any effort to ascertain the residence of any one of the holders of its bonds; here defendant had made such effort and has shown upon the trial that nearly one million dollars in nominal value thereof are held in Pennsylvania. We do not see how, on these facts, we can presume the ownership of the bonds within the State and hold defendant liable to tax upon them, and especially when there is not a scintilla of evidence on which we could base the presumption that any particular bonds are so owned, nor that the treasurer of defendant, when paying the tax, could or ought to have known that any given coupons presented to him for payment belonged to bonds so owned.

The act imposes the tax on "any scrip, bonds or certificates of indebtedness issued by said corporation to residents of this Commonwealth and held by them." A strict construction of this act would confine the liability to securities issued to and held by residents of the State. But while this would be a reasonable construction of the language of the act, it is fair to assume that the intent was to tax all the bonds actually owned and held within the State, whether issued to residents or not, and it must be so construed. If, however, we are to give any force whatever to the phrase "issued by said corporation to residents of the State," it must at least have the effect of suggesting that the fact whether the bonds were issued to residents or non residents furnishes a starting point in the
57 inquiry whether they are held within the State or not, and that where they were issued out of the State to non-residents and have not been shown, by either the Commonwealth or defendant, to be owned by residents, we cannot presume it in order to hold the defendant liable for tax in respect of them; while, at the same time, if they had been originally issued in the State to residents, it might be fair to presume, in the absence of proof, that the ownership had not changed and that they were still held by them. And when the presumption applies to all the bonds, the difficulty or inability to fix the situs of the ownership of any particular bond would not arise, and this was the fact in the case of The Commonwealth *v.* Manor Gas Coal Co.

As was said in Loughlin's Appeal, 19 W. N. C., 517, cited in Commonwealth *v.* Lehigh Valley R. R. Co., 129 Pa. St., page 451:

"We do not think it is the proper function of the judiciary department of the government to impose taxation, which is a species of confiscation, by a strained construction of doubtful legislation. The proper remedy for that kind of difficulty is legislation which is not doubtful."

If the legislature chooses to say that the corporation shall be liable for the tax on all bonds which it cannot prove to be held outside of the State, if it does not deduct the tax therefrom on payment of the interest, it can do so; until it does, we do not think it is the duty, or even the right, of the courts to read such a provision into the act as it now stands. We think the true principle upon which taxing acts should be construed is stated in Cooley on Taxation (2d ed.), 274, as follows:

"If there should be any leaning in such cases it would seem that it should be in the direction of the presumption that everything is expressed in the tax laws which was intended to be expressed. The laws are framed by the government for its own needs, and if imperfections are found to exist, the legislature, in the language of Mr. Dwarris, 'is at hand to explain its own meaning, and to express more clearly what has been obscurely expressed.' But there can be no propriety in construing such a law either with exceptional strictness amounting to hostility, or with exceptional favor
58 beyond that accorded to other general laws. It is as unreasonable to sound a charge upon it as an enemy to individual and popular rights, as it is to seek for sophistical reasons for grasping

and holding by its authority every subject of taxation which the drag-net of the official force has brought within its supposed compass. The construction, without bias or prejudice, should seek the real intent of the law; and if the leaning is to strictness it is only because it is fairly and justly presumable that the legislature, which was unrestrained in its authority over the subject, has so shaped the law as, without ambiguity or doubt, to bring within it everything it was meant should be embraced."

Conclusions of Law.

First. Defendant is liable for the tax in respect of the $841,000 of bonds held and owned in 1888 in Pennsylvania.

Second. Defendant is not liable for tax on any other or greater amount of bonds than said $841,000.00, and the settlement appealed from, so far as it charges defendant with tax on any other or greater amount of its indebtedness, is erroneous and illegal.

Third. The Commonwealth is entitled to judgment in this case as follows:

Tax, three mills on $841,000.00	$2,523 00
Interest at 12 per cent. from October 15, 1889, to December 17, 1890	355 57
Attorney general's commission at 5 per cent	116 25
Total	$2,994 82

For which amount judgment is directed to be entered, if exceptions be not filed within the time limited by law.

(Signed) J. W. SIMONTON, *P. J.*

59 *Defendant's Exceptions.*

COMMONWEALTH OF PENNSYLVANIA *vs.* NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.	No. 81. January Term, 1890. In the Court of Common Pleas of Dauphin County.

This case having been tried by the court without a jury, under the act of 1874, defendant files the following exceptions to the decisions of the court:

1. The learned court erred in not finding as a fact that the treasurer of defendant is, and was, in 1888, a resident of the State of New York.

2. The learned court erred in not finding as a fact that the legislation of the State of New York constituting the charter of the company, and in pursuance of which the bonds and mortgages were issued, is silent upon the subject of their taxation by the State of Pennsylvania, or the assessment or collection of a tax thereon by the company or its officers, and that the legislation of the State of Pennsylvania authorizing the construction of a portion of its road through a portion of said State is silent upon the subject of the

taxation of the bonds and mortgages of the company, or of the collection of a tax thereon by the company or its officers.

3. The learned court erred in not finding as a fact that the railroad of defendant extends from New York city to Buffalo, a distance of 446 miles, and that, so far as the State of Pennsylvania is concerned, the business of the company consists chiefly in the transportation of freight and passengers from or to, or from and to, other States, into, out of, or through, the State of Pennsylvania.

4. The learned court erred in not finding as a conclusion of law that the act of June 30, 1885, and particularly the fourth section thereof, is unconstitutional and void because in conflict with section 1 of article IX of the constitution of Pennsylvania.

60 5. The learned court erred in not finding as a conclusion *fo* law that the act of June 30, 1885, and particularly the fourth section thereof, is unconstitutional and void because in conflict with article V of the amendments to the Constitution of the United States which provides that "no person shall be * * * deprived of life, liberty or property without due process of law."

6. The court erred in not finding as a conclusion of law that the act of June 30, 1885, and particularly the fourth section thereof, is unconstitutional and void because in conflict with section 1 of article XIV of the amendments to the Constitution of the United States which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty nor property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

7. The court erred in not finding as a conclusion of law that the act of June 30, 1885, impairs the obligation of the charter contract between the company and the State of New York, in pursuance of which its bonds and mortgages were issued, and is, therefore, void, because in conflict with section 10 of article I of the Constitution of the United States, which forbids any State to pass any law "impairing the obligation of contracts."

8. The court erred in not finding as a conclusion of law that the act of June 30, 1885, impairs the obligation of the contract contained in the legislation of the State of Pennsylvania, in pursuance of which the railroad of said company was constructed through a portion of said State, and is, therefore, void, because in conflict with section 10 of article I of the Constitution of the United States.

9. The court erred in not finding as a conclusion of law that the act of June 30, 1885, impairs the obligation of the contracts between the company and its creditors, and is, therefore, void because in conflict with section 10 of article I of the Constitution of the United States.

10. The court erred in not finding as a conclusion of law that it is not within the constitutional authority of the State of Pennsylvania to impose upon a corporation of the State of

61 New York, or upon its treasurer being a resident of the State of New York, the duty of assessing, in the State of New York, a tax upon bonds and mortgages issued and sold in the State

of New York upon the payment of interest made in the city of New York, nor to hold the said company nor its treasurer responsible for failure so to assess and deduct the same from interest paid upon said bonds and mortgages in the city and State of New York, and the act of June 30, 1885, if it shall be construed to authorize the account settled by the auditor general in this case, or any part thereof, is void because in violation of a necessary implication of the Constitution of the United States, which confines the power of each State to tax subjects within its territorial sovereignty, and by reason of which all subjects over which the sovereign power of a State does not extend are exempt from taxation or control by said State.

11. The learned court erred in not holding that, in so far as it applies to the New York, Lake Erie and Western Railroad Company, the fourth section of the act of June 30, 1885, is unconstitutional and void because in conflict with that provision of the Constitution of the United States which confers upon Congress the power "to regulate commerce with foreign nations and among the several States and with the Indian tribes."

12. The learned court erred in not holding as a conclusion of law that, in so far as it requires the corporation to deduct from the amount due upon a coupon owned or presented by one person, the tax due upon the bond from which said coupon had been detached, the said bond belonging to a different person, the act of June 30, 1885, is unconstitutional and void because impairing the obligation of the contract between the corporation and the holder of the coupon, and therefore in conflict with section 10 of article I of the Constitution of the United States.

13. The learned court erred in its first conclusion of law as follows: "Defendant is liable for tax in respect of the $841,000 of bonds held and owned in 1888 in Pennsylvania."

14. The learned court erred in directing judgment to be entered in favor of the Commonwealth for $2,994.82.

15. The learned court erred in not directing judgment to be entered in favor of defendant.

(Signed) M. E. OLMSTED,
Attorney for Defendant.

62 *Commonwealth's Exceptions.*

COMMONWEALTH OF PENNSYLVANIA *vs.* NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY. } In the Court of Common Pleas of Dauphin County. No. 81. January Term, 1890.

The following exceptions are respectfully specified on behalf of the Commonwealth of Pennsylvania to the findings and opinion of the court, filed December 18, 1890:

1. The learned court erred in a portion of its finding of fact, numbered four, as follows:

"It is practically impossible for the treasurer or other officers of

defendant, at the time the coupons are presented, to ascertain the residence of the owners of the bonds from which they have been separated, because of the large numbers of coupons presented at the dates when they become due, the whole number of coupons due semi-annually amounting to more than one hundred and fifty thousand, and as many as twenty thousand being presented in a single day; and for the further reason, that the banker- and their messengers, when they present the coupons, in very many instances, do not know who are the owners of the bonds from which they heve been detached, and could not be compelled to disclose if they did know, as the coupons are payable to bearer, and a refusal of the treasurer of the company to pay the coupons on being presented, except upon condition of the ownership being disclosed, would subject it to the risk and expense and loss of credit of having the coupons protested for non-payment."

2. The learned court erred in a portion of its finding of fact, numbered four, as follows:

"And for the further reason, that the bankers and their messengers, when they present the coupons, in very many instances, do not know who are the owners of the bonds from which they have been detached, and could not be compelled to disclose if they did know, as the coupons are payable to bearer, and a refusal of the treasurer of the company to pay the coupons on being presented, except upon condition of the ownership being disclosed, would subject it to the risk and expense and loss of credit of having the coupons protested for non-payment."

63 3. The learned court erred in the seventh finding of fact, which is as follows:

"There is no evidence in the case from which we could find that any particular bonds, other than those which make up the two amounts of $338,000 and $503,000, as above stated, were held or owned during the year 1888 in Pennsylvania, nor is there any evidence tending to show that the treasurer of defendant, at the time the coupons were paid, could know that any, and if any which, of the coupons, other than those which belonged to the bonds above specified belonged to bonds held or owned in this State, and we, therefore, do not find that there were any other bonds, or any greater amount of bonds, held in Pennsylvania, during the year for which the tax is claimed in this settlement, than the bonds specified in findings of fact numbers five and six."

4. The learned court erred in not finding as a matter of fact, based upon the undisputed testimony of the defendant's witnesses, that the defendant company made no inquiry or effort in any way to gain information as to the holders of its bonds, scrip and evidences of indebtedness for purposes of the taxing statute in question, to wit: the fourth section of the act of June 30, 1885.

NOTE.—The said undisputed evidence is on page 25 of the depositions in the testimony of Mr. White:

"Q. Have you made any inquiry or tried in any way to inform yourself as to who the holders are?"

"A. No, sir."

"By Mr. OLMSTED:

"Q. Except that you know from Mr. McDonough's examination of his register?"
"A. Oh, yes."

Also in the deposition of the same witness, page 20:

"By Mr. SANDERSON:

"Q. Do you make or cause to be made any inquiry as to who are the holders of the bonds when interest is paid?"
"A. No; we could not do that."

Also in the testimony of Mr. A. R. McDonough, page 15 of the deposition:

"By Mr. SANDERSON:

"Q. In other words, you register the name of the actual holder without reference to the nature of his ownership?"
"A. In the voting register."

"By Mr. SANDERSON:

"Q. And without inquiry as to the nature of his ownership?"
"A. Yes, sir."

64 "By Mr. SANDERSON:

"Q. And without inquiry as to his residence or the residence of any one whom he may represent?"
"A. We paid no attention to that at all; no inquiry about it."

Also in the testimony of the same witness, page 15.

"Q. The voting register does not show the residence of the holders who had registered for voting purposes?"
"A. It does not."
"Q. And no inquiry is made at the time of registration as to the residence of such holders?"
"A. None at all."

5. The learned court erred in not holding, as matter of law, that, inasmuch as the defendant company resists in this suit any liability whatever to perform the duties enjoined by the fourth section of the act of June 30, 1885, and has neglected and refused to perform any duties thereunder, particularly in failing to make any effort to assess the tax imposed, and in failing to make any inquiry as to the residence of the holders of its bonds, scrip and evidences of indebtedness, it is subject to the operation of any reasonable presumption founded upon the evidence which affords a reasonable basis of estimating and ascertaining the amount of its bonds, scrip and evidences of indebtedness held by residents of Pennsylvania.

6. The court erred in not holding, in connection with the matters stated in the last foregoing exception, that the proportion of bonds registered upon the voting and ownership registers held by residents of Pennsylvania, as compared with the total amount of bonds

registered, was a fair basis upon which to found the presumption, as matter of fact, that all the bonds, scrip and evidences of indebtedness issued by the defendant corporation were held in the same proportion by residents of Pennsylvania.

7. The learned court erred in not finding, as matter of fact, that $\frac{2}{3}\frac{3}{9}\frac{9}{6}\frac{2}{8}\frac{}{7}$ of the bonds, scrip and evidences of indebtedness issued by the defendant, amounting to $4,735,751.66, was held by residents of Pennsylvania.

8. The learned court erred in its first conclusion of law, which is as follows:

"Defendant is liable for the tax in respect of the $841,000 of bonds held and owned in 1888 in Pennsylvania."

65 9. The learned court erred in its second conclusion of law, which is as follows:

"Defendant is not liable for tax on any other or greater amount of bonds than said $841,000.00, and the settlement appealed from, so far as it charges defendant with tax on any other or greater amount of its indebtedness, is erroneous and illegal."

10. The learned court erred in not entering judgment in favor of the Commonwealth for tax at the rate of three mills on $4,735,751.66, amounting to *to* $14,207.25, with interest and attorney general's commissions.

(Signed) W. S. KIRKPATRICK,
Attorney General.

66 *Opinion on Exceptions.*

COMMONWEALTH OF PENNSYLVANIA *vs.* NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.	In the Court of Common —, Dauphin County. No. 81. January Term, 1890.

Exceptions by plaintiff and by defendant.

By the COURT:

Plaintiff's exceptions numbers one, two and three are overruled.

Plaintiff's exception number four is that "The learned court erred in not finding, as matter of fact, based upon the undisputed testimony of the defendant's witnesses, that the defendant company made no inquiry or effort in any way to gain information as to the holders of its bonds, scrip and evidences of indebtedness for purposes of the taxing statute in question, to wit: the fourth section of the act of June 30, 1885."

We cannot sustain this exception. On the contrary, we find that defendant did endeavor to find what bonds were held in Pennsylvania, and that it, and not the Commonwealth, furnished the evidence on which we have found that the bonds which we have decided to be taxable were held in Pennsylvania. This exception is, therefore, overruled.

In answer to plaintiff's exceptions numbers five, six and seven, we say: That we have pointed out, in the opinion to which these

exceptions are filed, that "The argument of the learned attorney general leaves wholly out of view this most important element of the case, that the duty and the right to retain the amount of the tax on payment of the interest is a duty and a right which attaches to each individual bond and its coupon, and not to the bonds and coupons in the mass;" to which we now add that the position of the Commonwealth is practically that repudiated by the supreme court in City of Philadelphia *v.* Thomas Cochran, 34 Leg. Int. 160, and by this court in City of Philadelphia *v.* Mackey, 2 Pears., 406, Commonwealth *v.* Blair County, 2 Pears., 415, and Common-
67 weaeth *v.* Butler County, *ib.*, 421 and Commonwealth *v.* City of Philadelphia, 14 W. N. C., 371, in all of which it was held that subjects of taxation cannot be added to the assessment list where the owners, who are liable to pay the tax thereon, cannot be ascertained. These exceptions are, therefore, overruled.

Exceptions eight, nine and ten are also overruled.

Defendant's exceptions numbers one, two and three are to the effect that the court erred in not finding certain facts stated in said exceptions. We find the facts to be as stated in these exceptions, although we consider them immaterial.

All the other exceptions filed by defendant are overruled; and judgment is ordered to be entered as directed in the opinion heretofore filed.

(Signed) J. W. SIMONTON, *P. J.*

68 *Supreme Court of Pennsylvania Docket Entries.*

At a supreme court of the State of Pennsylvania, sitting in and for the middle district of the said court, at the city of Harrisburg, Pennsylvania, on the 21st Monday following the first Monday of January, A. D. 1891.

Present: The Honorable Edward M. Paxson, chief justice; James P. Sterrett, Henry Green, Silas M. Clark, Henry W. Williams, James T. Mitchell, and J. Brewster McCollum, justices, and William Pearson, prothonotary of said court.

Among the records of the said supreme court of Pennsylvania in and for the middle district, to May term, 1891, No. 34, it is contained as follows, to wit:

Docket entries.

NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY, Defendant Below,
vs.
COMMONWEALTH OF PENNSYLVANIA, Plaintiff Below.

Olmsted.

1891, Apr. 15.—Precipe, appeal, affidavit, and recog. filed.
Eo die, exit writ of certiorari r't'ble *sec. reg.*
1891, June 1.—Record returned and filed.
" " Assignments of error filed.
" June 2.—Argued.

1891, June 12th.—Judgment affirmed *per curiam*.

Petition for allocatur of writ of error from Supreme Court of the United States.

Allocatur of said writ by Hon. Joseph P. Bradley, justice of said court.

And said writ of error received and filed.

69 Citation from said Hon. Joseph P. Bradley and affidavit of service thereof to Jas. A. Stranahan, deputy attorney general for the Commonwealth of Pennsylvania, and writ of error bond in the sum of five thousand dollars ($5,000.00) received and filed.

Certified from the record.

[Seal of the Supreme Court of Pennsylvania, Middle District. 1776.]

WILLIAM PEARSON, *Prothonotary.*

70 *Precipe.*

In the Supreme Court of Pennsylvania for the Middle District.

COMMONWEALTH OF PENNSYLVANIA *vs.* NEW YORK, LAKE ERIE & WESTERN RAILROAD CO.	Certiorari to the Court of Common Pleas for the County of Dauphin, of January Term, 1890. No. 81.

Issue certiorari to the court of common pleas of the county of Dauphin to bring up record and proceedings in a certain action in said court, No. 81, January term, 1890, wherein The Commonwealth of Penna. was plaintiff and The N. Y., L. E. & Western R. R. Co. defendant.

Returnable to next term, *sec. reg.*

M. E. OLMSTED.

To Wm. Pearson, proth'y sup. court, middle district.

71 *Precipe for Appeal.*

In the Supreme Court of Pennsylvania for the Middle District.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff, *vs.* NEW YORK, LAKE ERIE & WESTERN R. R. Co., Defendant.	Court of Common Pleas of Dauphin County. No. 81. January Term, 1890.

Enter appeal on behalf of New York, Lake Erie & Western R. R. Co., defendant, from the judgment of the court of common pleas of the county of Dauphin in the above-entitled case.

M. E. OLMSTED,
Att'y for Defendant.

To Wm. Pearson, Esq., proth'y sup. c't, middle district.

Affidavit.

COUNTY OF DAUPHIN, *ss:*

M. E. Olmsted, being duly sworn, saith that the above appeal is not intended for delay.

M. E. OLMSTED.

Sworn and subscribed this 15th day April, A. D. 1891.

WILLIAM PEARSON,
Prothonotary,
Per JOHN HARNER,
Dep'ty Prot'y.

72 *Recognizance.*

In the Supreme Court of Pennsylvania for the Middle District.

COMMONWEALTH OF PENNSYLVANIA
vs.
NEW YORK, LAKE ERIE & WESTERN RAILROAD CO. } No. 81.

Appeal of defendant from the judgment of the court of common pleas for the county of Dauphin of January term, 1890.

We, Russell P. Butler and A. C. Stamm, severally acknowledge to owe the above-named Commonwealth of Pennsylvania the sum of one hundred dollars upon condition that the above-named defendant prosecute its appeal with effect, and if said judgment be affirmed or the appeal be discontinued or nonprossed that said def't will pay the cost adjudged or accruing upon such appeal and all other costs that may be awarded upon such appeal, or else we will do it for it.

R. P. BUTLER.
A. C. STAMM.

Taken and acknowledged this 15th day of April, A. D. 1891.

WILLIAM PEARSON,
Prothonotary,
Per JOHN HARNER,
Dep'ty Prot'y.

73 *Writ of Certiorari.*

MIDDLE DISTRICT OF PENNSYLVANIA, *sct:*

[Seal of Supreme Court of Pennsylvania.]

The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Dauphin, Greeting:

We, being willing for certain causes to be certified of the appeal of the New York, Lake Erie & Western Railroad Company from the judgment of the said court in a case wherein The Commonwealth of Pennsylvania was plaintiff and the said appellant was defendant, to No. 81, Jan. term, 1890, before you or some of you de-

pending, do command you that, the record and proceedings aforesaid, with all things touching the same, before the justices of our supreme court, at a supreme court to be holden at Harrisburg, in and for the middle district of said Commonwealth, on the 21 Monday foll. 1 Mon. of Jan., 1891, being the 1st Monday of the term, so full and entire as in our court before you they remain, you certify and send together with this writ, that we may further cause to be done thereupon what of right and according to our laws of the said State ought.

Witness the Hon. Edward M. Paxson, doctor of laws, chief justice of our supreme court, at Harrisburg, the 15th day of April, in the year of our Lord one thousand eight hundred and ninety-one, and of the Commonwealth the 115th.

WILLIAM PEARSON,
Prothonotary.

74 [Endorsed:] No. 34. May term, 1891. Supreme court, middle district. Appeal of New York, Lake Erie & Western Railroad Co. No. 81, Jan. term, 1890. Certiorari surappeal to the court of common pleas for the county of Dauphin. Returnable the 21 Mon. foll. 1 Monday of Jan., 1891. "Rule on the appellee to appear and plead on the return day of the writ." N. B.—10 days' notice to the parties or their counsel below necessary to compel an appearance. Filed April 16th, 1891.

The record and process, with all things touching the same, so full and entire as before us they remain, to the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the middle district, we certify and send as within we are commanded.

JOHN W. SIMONTON, *P. J.* [L. S.]

I certify that recognizance for costs in $100, with A. C. Stamm and R. P. Butler as bail, has been duly filed in the supreme court.

WILLIAM PEARSON,
Prothonotary.

April 16th, 1891.—Service of the within writ accepted.

JAMES A. STRANAHAN,
Deputy Attorney General.

Filed in supreme court June 1st, 1891.

75 *Assignments of Error.*

I. The learned court erred in overruling defendant's fourth exception, which exception was as follows, viz:

"4. The learned court erred in not finding as a conclusion of law that the act of June 30, 1885, and particularly the fourth section thereof, is unconstitutional and void because in conflict with section 1 of article IX of the constitution of Pennsylvania."

II. The learned court erred in overruling defendant's fifth exception, which exception was as follows, viz:

"5. The learned court erred in not finding as a conclusion of law that the act of June 30, 1885, and particularly the fourth section thereof, is unconstitutional and void because in conflict with article V of the amendments to the Constitution of the United States, which provides that 'No person shall be * * * deprived of life, liberty or property without due process of law.'"

III. The learned court erred in overruling defendant's sixth exception, which exception was as follows, viz:

"6. The court erred in not finding as a conclusion of law that the act of June 30, 1885, and particularly the fourth section thereof, is unconstitutional and void because in conflict with section 1 of article XIV of the amendments to the Constitution of the United States, which provides that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty nor property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'"

IV. The learned court erred in overruling defendant's seventh exception, which exception was as follows, viz:

"7. The court erred in not finding as a conclusion of law that the act of June 30, 1885, impairs the obligation of the charter contract between the company and the State of New York, in pursuance of which its bonds and mortgages were issued, and is, therefore, void, because in conflict with section 10 of
76 article I of the Constitution of the United States, which forbids any State to pass any law 'impairing the obligation of contracts.'"

V. The learned court erred in overruling defendant's eighth exception, which exception was as follows, viz:

"8. The court erred in not finding as a conclusion of law that the act of June 30, 1885, impairs the obligation of the contract contained in the legislation of the State of Pennsylvania, in pursuance of which the railroad of said company was constructed through a portion of said State, and is, therefore, void, because in conflict with section 10 of article I of the Constitution of the United States."

VI. The learned court erred in overruling defendant's ninth exception, which exception was as follows, viz:

"9. The court erred in not finding as a conclusion of law that the act of June 30, 1885, impairs the obligation of the contracts between the company and its creditors, and is, therefore, void because in conflict with section 10 of article I of the Constitution of the United States."

VII. The learned court erred in overruling defendant's tenth exception, which exception was as follows, viz:

"10. The court erred in not finding as a conclusion of law that it is not within the constitutional authority of the State of Pennsylvania to impose upon a corporation of the State of New York or upon its treasurer, being a resident of the State of New York, the duty of assessing, in the State of New York, a tax upon bonds and mortgages issued and sold in the State of New York upon the payment of interest made in the city of New York, nor to hold the said

company nor its treasurer responsible for failure so to assess and deduct the same from interest paid upon said bonds and mortgages in the city and State of New York, and the act of June 30, 1885, if it shall be construed to authorize the account settled by the auditor general in this case, or any part thereof, is void because in violation of a necessary implication of the Constitution of the United States, which confines the power of each State to tax subjects within its territorial sovereignty and by reason of which all subjects over which the sovereign power of a State does not extend are exempt from taxation or control by said State."

VIII. The learned court erred in overruling defendant's eleventh exception, which exception was as follows, viz:

"11. The learned court erred in not holding that, in so far as it applies to the New York, Lake Erie and Western Railroad
77 Company, the fourth section of the act of June 30, 1885, is unconstitutional and void, because in conflict with that provision of the Constitution of the United States which confers upon Congress the power to regulate commerce with foreign nations and among the several States and with the Indian tribes."

IX. The learned court erred in overruling defendant's twelfth exception, which exception was as follows, viz:

"12. The learned court erred in not holding as a conclusion of law that, in so far as it requires the corporation to deduct from the amount due upon a coupon owned or presented by one person, the tax due upon the bond from which said coupon had been detached, the said bond belonging to a different person, the act of June 30, 1885, is unconstitutional and void because impairing the obligation of the contract between the corporation and the holder of the coupon, and, therefore, in conflict with section 10 of article I of the Constitution of the United States."

X. The learned court erred in overruling defendant's thirteenth exception, which exception was as follows, viz:

"13. The learned court erred in its first conclusion of law as follows: 'Defendant is liable for tax in respect of the $841,000.00 of bonds held and owned in 1888 in Pennsylvania.'"

XI. The learned court erred in directing judgment to be entered in favor of the Commonwealth for $2,994.82.

XII. The learned court erred in not directing judgment to be entered in favor of defendant.

78 *Opinion of Supreme Court.*

C. P. of Dauphin, May T., 1891.

COMMONWEALTH
vs.
NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY, Appellant. } 34.

Per CURIAM:

This case is ruled by Com. *vs.* N. Y., L. E. & Western R. R. Co., 129 Pa., 463. See also Com. *vs.* Lehigh Valley R. R. Co., 2d, 429. A further discussion of the subject is not needed.

Judgment affirmed.

79 *Return to Writ of Error from Supreme Court of the United States.*

And now here, on this day, to wit, August 5th, 1891, the said The New York, Lake Erie & Western Railroad Company produced to the supreme court of Pennsylvania here the writ of the United States of America for the correcting of errors of and upon the said premises, commanding the record and proceedings aforesaid of the judgment aforesaid so as aforesaid rendered, with all things touching the same, to be transmitted to the Supreme Court of the United States, to be held at the city of Washington on the second Monday of October next, which writ of error is hereunto annexed.

In pursuance whereof and according to the form and effect of the act of Congress in such case made and provided a transcript of the records and proceedings of the judgment aforesaid so as aforesaid rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court of the United States accordingly.

80 To the Honorable Joseph P. Bradley, justice of the Supreme Court of the United States:

The petition of the New York, Lake Erie & Western Railroad Company respectfully showeth—

That your petitioner is a corporation created by and existing under the laws of the State of New York, owning and operating a railroad extending from Jersey City, in the State of New Jersey, to Dunkirk, in the State of New York, a distance of about 428 miles, of which, in order to avoid engineering difficulties, about 42 miles were constructed within the counties of Susquehanna and Pike, in Pennsylvania, under authority conferred by certain legislation of said State upon the condition of paying for the privilege $10,000 per annum into the State treasury and an annual tax upon an amount of capital stock of the company equal to the cost of the construction of that portion of its works in Pennsylvania, which annuity and tax have been regularly paid.

That, pursuant to authority contained in its charter granted by the State of New York, your petitioner has heretofore issued or assumed the payment of bonds and mortgages to the amount of $78,573,485.10, all of which were outstanding during the year 1888.

That by the first section of the Pennsylvania statute of June 30, 1885, there is imposed upon all bonds, mortgages, and other personal property there enumerated in the hands of individual citizens of said State a tax of three mills upon the actual value thereof annually.

81 That by the fourth section of the said act it is made the duty of the treasurer of each private corporation chartered by or doing business in Pennsylvania, upon the payment of any interest upon bonds issued by it, to assess the said bonds at their

nominal or par value and deduct a tax of three mills thereon from the interest paid.

That the mortgages securing the aforesaid $78,573,485.10 of bonds are 15 in number, and that the bonds themselves are over 80,000 in number; they were all issued to non-residents of Pennsylvania and are now widely scattered, being owned by residents of the various States of the Union, and also largely held in England, Scotland, and other foreign countries, the interest being represented by coupons which are seldom presented for payment by the persons owning the bonds, but by messengers of banks and other collection agencies, frequently passing through three or four banks before reaching the office of the company for payment, several thousand coupons frequently being presented for payment in a single day, and the bank messengers and other collection agents presenting them seldom knowing the name or names or residence of the owners of the bonds from which they have been severed.

That the general office and treasury of your petitioner are in the city and State of New York, of which State and city its treasurer and general officers are residents. The interest upon the bonds aforesaid is paid, some of it in London, England, but mainly at the office of your petitioner's treasurer in New York. For the reasons aforesaid and others it is absolutely impossible for your petitioner or any of its officers at the time of paying said interest to
82 determine what coupons, if any, presented for payment have been cut from bonds owned by residents of Pennsylvania, and therefore impossible for your petitioner or any of its officers to retain from the interest any tax upon said bonds except by withholding from all of its bondholders, non-residents as well as residents of Pennsylvania, the interest due them.

That for the year 1888 the treasurer of your petitioner made report to the auditor general of Pennsylvania, setting forth the number and description of its mortgages and the bonds secured thereby and setting forth that, substantially for the reasons aforesaid, it had been impossible for any officer of the company to deduct any Pennsylvania State tax when paying interest, and that no such tax had been deducted, and also denying the authority of the State of Pennsylvania to require either your petitioner or its treasurer or any of its officers to act as agents in New York for the collection of Pennsylvania State taxes.

That thereupon the auditor general and State treasurer of Pennsylvania settled an account against your petitioner for a tax of three mills upon the nominal value of the entire $78,573,485.10 of its indebtedness, said tax amounting to $234,491.85, from which account, agreeably to the laws of Pennsylvania, your petitioner appealed to the court of common pleas of Dauphin county, to No. 81, January term, 1890.

83 That upon the trial of the case evidence requiring months of labor in its preparation on the part of the officers of the company was submitted, showing that, as nearly as could be ascertained, $841,000 of bonds issued by it had been in the year 1888 owned by individuals residing in Pennsylvania. The court of common pleas

thereupon directed judgment to be entered for tax upon the said $841,000 of bonds.

That from said decision your petitioner filed exceptions, among which were the following:

"The learned court erred in not finding as a conclusion of law that the act of June 30, 1885, and particularly the fourth section thereof, is unconstitutional and void because in conflict with article V of the amendments to the Constitution of the United States, which provides that 'no person shall be * * * deprived of life, liberty, or property without due process of law.'"

"The court erred in not finding as a conclusion of law that the act of June 30, 1885, and particularly the fourth section thereof, is unconstitutional and void because in conflict with section 1 of article XIV of the amendments to the Constitution of the United States, which provides that 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, nor property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.'"

"The court erred in not finding as a conclusion of law that the act of June 30, 1885, impairs the obligation of the charter contract between the company and the State of New York in pursuance of which its bonds and mortgages were issued, and is therefore void because in conflict with section 10 of article I of the Constitution of the United States, which forbids any State to pass any law 'impairing the obligation of contracts.'"

"The court erred in not finding as a conclusion of law that the act of June 30, 1885, impairs the obligation of the contract contained in the legislation of the State of Pennsylvania in pursuance of which the railroad of said company was constructed through a portion of said State, and is therefore void because in conflict with section 10 of article I of the Constitution of the United States."

"The court erred in not finding as a conclusion of law that the act of June 30, 1885, impairs the obligation of the contracts
84 between the company and its creditors, and is therefore void because in conflict with section 10 of article I of the Constitution of the United States."

"The court erred in not finding as a conclusion of law that it is not within the constitutional authority of the State of Pennsylvania to impose upon a corporation of the State of New York or upon its treasurer, being a resident of the State of New York, the duty of assessing in the State of New York a tax upon bonds and mortgages issued and sold in the State of New York upon the payment of interest made in the city of New York, nor to hold the said company nor its treasurer responsible for failure so to assess and deduct the same from interest paid upon said bonds and mortgages in the city and State of New York, and the act of June 30, 1885, if it shall be construed to authorize the account settled by the auditor general in this case, or any part thereof, is void because in violation of a necessary implication of the Constitution of the United States, which confines the power of each State to tax subjects within

its territorial sovereignty, and by reason of which all subjects over which the sovereign power of a State does not extend are exempt from taxation or control by said State."

The learned court erred in not holding that, in so far as it applies to the New York, Lake Erie & Western Railroad Company, the fourth section of the act of June 30, 1885, is unconstitutional and void because in conflict with that provision of the Constitution of the United States which confers upon Congress the power to 'regulate commerce with foreign nations and among the several States and with the Indian tribes.'"

"The learned court erred in not holding as a conclusion of law that, in so far as it requires the corporation to deduct from the amount due upon a coupon owned or presented by one person the tax due upon the bond from which said coupon had been detached, the said bond belonging to a different person, the act of June 30, 1885, is unconstitutional and void because impairing the obligation of the contract between the corporation and the holder of the coupon, and therefore in conflict with section 10 of article I of the Constitution of the United States."

That all of said exceptions filed by your petitioner were overruled by the said court of common pleas of Dauphin county, and judgment therein entered for tax upon said $841,000 of bonds, with interest at 12 per centum and 5 per cent. attorney general's commission, amounting in the whole to $2,994.82.

85 That your petitioner appealed from said judgment to the supreme court of Pennsylvania, to No. 34, May term, 1891, in the middle district thereof, and among its assignments of error included the overruling of the aforesaid exceptions.

That the supreme court of Pennsylvania refused to sustain said assignments of error and on the twelfth day of June, A. D. 1891, affirmed the judgment of the court of common pleas of Dauphin county.

That the supreme court of Pennsylvania, in which said cause was heard and decided, is the highest court of record and the court of last resort in the Commonwealth of Pennsylvania.

That the judgment of said court is final.

That the judgment of said court, as already shown, necessarily involved the decision of a Federal question and the said decision is in favor of the State and against the immunity claimed by your petitioner under the Constitution of the United States.

Wherefore your petitioner (herewith presenting a bond with security for approval) prays that a writ of error may be allowed to issue to the said supreme court of Pennsylvania to bring up the record to the Supreme Court of the United States for correction in that which violates the Constitution and laws thereof, and that the citation to the defendant may accompany the same; and it will ever pray, &c.

Harrisburg, Pa., July 7, 1891.

THE NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY.

By its attorney, M. E. OLMSTED.

86 Presented & allowed July 22d, 1891.

JOS. P. BRADLEY,
Asso. Justice Sup. C't U. S.

87 [Endorsed:] In U. S. Supreme Court. New York, Lake Erie & Western Railroad Co., plaintiff in error, *vs.* Commonwealth of Pennsylvania. Petition for writ of error. Filed in supreme court, middle district, Aug. 6. 1891. M. E. Olmsted.

88 Know all men by these presents that we, the New York, Lake Erie & Western Railroad Company and William H. Metzger and A. C. Stamm, of the city of Harrisburg and State of Pennsylvania, are held and firmly bound unto the Commonwealth of Pennsylvania in the full and just sum of five thousand dollars ($5,000), to be paid to the said Commonwealth of Pennsylvania or her certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, by these presents.

Sealed with our seals and dated this sixteenth day of July, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at a court of common pleas in and for the county of Dauphin, State of Pennsylvania, in a suit depending in said court between the Commonwealth of Pennsylvania and the New York, Lake Erie & Western Railroad Company, in which judgment was rendered against the said New York, Lake Erie & Western Railroad Company, which judgment was afterwards affirmed by the supreme court of Pennsylvania in a suit of said court of May term, 1891, No. 34, in the middle district of said court; and the said New York, Lake Erie & Western Railroad Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Commonwealth of Pennsylvania, citing and admonishing her to be and appear at a Supreme Court of the United
89 States to be holden at Washington within thirty days from the date of said writ of error:

Now, the condition of the above obligation is such that if the said New York, Lake Erie & Western Railroad Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY,
(Signed) JOHN KING, *President.*

Attest:
[SEAL.] A. R. MACDONOUGH, *Secretary.*

(Signed) W. H. METZGER.
" A. C. STAMM.

Attest: —— ——, *Secretary.*

Signed, sealed, and delivered in presence of—
(Signed) A. J. SMALLWOOD.
" RUSSELL P. BUTLER.

Approved by—
JOSEPH P. BRADLEY,
Asso. Justice Sup. Ct. U. S.

UNITED STATES OF AMERICA, } ss:
Litchfield, Connecticut, }

Alexander C. Stamm maketh oath and saith that he is worth thirty-five hundred dollars after all his debts are paid and he knows William H. Metzger, the other surety in the foregoing bond, and believes him to be worth fifteen thousand dollars after all his debts are paid.

(Signed) A. C. STAMM.

Sworn and subscribed before me July 22, 1891.
[SEAL.] (Signed) JOSEPH P. BRADLEY,
Asso. Justice Sup. C't U. S.

[Endorsed:] Copy. In U. S. Supreme Court. New York, Lake Erie & Western Railroad Company (plaintiff in error) *vs.* Commonwealth of Pennsylvania. Bond.
[Stamped:] Filed in Supreme Court, middle district, Aug. 6, 1891.

90 *Certificate.*

STATE OF PENNSYLVANIA, } ss:
County of Dauphin, }

In testimony that the foregoing, contained on pages one to 82, inclusive, is a full, true, and correct copy of the record and proceedings of the supreme court of the State of Pennsylvania, the highest court of law and equity in that State, in the case lately depending therein to No. 34, May term, A. D. 1891, wherein The New York, Lake Erie & Western Railroad Company was appellant and The Commonwealth of Pennsylvania was appellee, I have hereunto subscribed my name and affixed the seal of the said supreme court, at Harrisburg, this 6th day of August, A. D. 1891.

WILLIAM PEARSON,
Prothonotary of the Middle District of the Supreme Court of Pennsylvania.

[Seal of the Supreme Court of Pennsylvania, Middle District. 1776.]

Endorsed on cover: Case No. 14,803. Pennsylvania supreme court. No. 591. The New York, Lake Erie & Western Railroad Company, plaintiff in error, *vs.* The Commonwealth of Pennsylvania. Filed August 13, 1891.

FILED
NOV 3 1893
JAMES. H. McKENNEY,
CLERK.

153-628

IN THE

Supreme Court of the United States.

Nos. 75, 79, and 591, OCTOBER TERM, 1893.

New York, Lake Erie and Western Railroad Company,

PLAINTIFF IN ERROR,

vs.

Commonwealth of Pennsylvania.

Three Writs of Error to the Supreme Court of Pennsylvania. To be Tried, by Agreement, upon the Record in No. 591.

PAPER BOOK OF PLAINTIFF IN ERROR.

M. E. OLMSTED,
Attorney for Plaintiff in Error.

In the Supreme Court of the United States.

Nos. 75, 79 and 591, OCTOBER TERM, 1893.

NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY,

Plaintiff in Error,

vs.

COMMONWEALTH OF PENNSYLVANIA.

Three Writs of Error to the Supreme Court of Pennsylvania. To be tried, by agreement, upon the record in No. 591.

PAPER BOOK OF PLAINTIFF IN ERROR.

I. AGREEMENT.

So far as this Court is concerned, these three cases present the same questions; but in two of them additional questions were involved in the State courts, and the records are very voluminous. For convenience of court and counsel, the following agreement has been filed:

"And now, to wit: February 14, 1893, it is hereby agreed that the three suits in the Supreme Court of the United States, Nos. 314, 318 and 886, October Term, 1892, (Nos. 75, 79 and 591, October Term, 1893,) in each of which the New York, Lake Erie and Western Railroad Company is plaintiff in error,

and Commonwealth of Pennsylvania is defendant in error involve precisely the same questions, and that they shall be tried together as one case upon the record in No. 886, (October Term, 1892; 591 October Term, 1893) and that the records in Nos. 314 and 318 (75 and 79 October Term, 1893) shall not be printed, except as either party may refer to them in argument."

JAS. A. STRANAHAN,
Deputy Attorney General of Pennsylvania.

M. E. OLMSTED,
Attorney for N. Y., L. E. & Western R. R. Co.

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II. STATEMENT OF THE CASES.

The first section of the Pennsylvania statute of June 30, 1885, (P. L. 193), enacts "That all mortgages, money owing by solvent debtor, whether by promissory note, or penal or single bill, bond or judgment, ... and all other moneyed capital in the hands of individual citizens of the State, shall be and are hereby taxable for State purposes, at the rate of three mills on the dollar of the value thereof annually." Bonds, mortgages, etc., issued by individuals, or by foreign corporations not doing business in the State are, when owned by individual citizens of the State, required to be assessed at actual value in the hands of the holders by the local assessors in each tax district; but as to the bonds and mortgages issued by corporations doing business in the State, a different method for the assessment and collection of the tax is provided in the fourth section, which, in its entirety, reads as follows:

"SECTION 4. That hereafter it shall be the duty of the treasurer of each private corporation, incorporated by or under the laws of this Commonwealth, or the laws of any other State, or of the United States, and doing business in this Commonwealth, upon the payment of any interest on any scrip, bond or certificate of indebtedness, issued by said corporation to residents of this Commonwealth, and held by them, to assess the tax imposed and provided for State purposes upon the

nominal value of each and every said evidence of debt, and to report on oath, annually on the first Monday of November, to the Auditor General the amount of indebtedness of the corporation owned by residents of this Commonwealth, as nearly as the same can be ascertained; and it shall be his further duty to deduct three mills on every dollar of the interest paid as aforesaid and return the same into the State Treasury within fifteen days after the thirty-first day of December in each year; and his compensation for his services shall be the same that city and borough treasurers receive for similar services; and for every failure to assess and pay said tax and make report as aforesaid, the Auditor General shall add ten per centum as a penalty to the amount of the tax; in payment of said tax by a corporation the bonds, certificates or other evidences of indebtedness issued by it shall be exempt from all other taxation in the hands of the holders of the same."

The tax is imposed upon the holder of the bond, but the treasurer of the corporation, which issued it, is compelled to act as the agent or the officer of the Commonwealth for ascertaining the residence of the owner of the bond, the assessment of the bond, and for the collection of the tax by withholding it from the interest due to the bondholder.

The New York, Lake Erie and Western Railroad Company is a corporation of the State of New York, owning and operating a railroad about four hundred and forty-six miles in length, extending from the city of New York, or more properly from Jersey City, to Buffalo in the State of New York. To avoid certain engineering difficulties in the construction of the railroad, it was found necessary, or desirable, that following a bend in the Delaware river, it should cross the line from New York into Pennsylvania and, extending about thirty miles in said State, cross again into the State of New York. For the purpose of thus constructing its road through a portion of the State of Pennsylvania, the company obtained the authority of two special acts of the Legislature, granting it the necessary privilege upon certain conditions therein expressed, among others, the payment of an annuity of $10,000. (See the Acts of 1841 and 1846 printed in full commencing on page 15 hereof.)

The company has complied with the Pennsylvania statute

of April 22, 1874 (P. L. 108), which requires that foreign corporations doing business in said State shall designate an office and appoint an agent therein, upon whom process may be served.

So far as the State of Pennsylvania is concerned, the business of the company consists chiefly in the transportation of freight and passengers from or to, or from and to, other States, into, out of, or through, said State of Pennsylvania. The Treasurer of the company is a resident of the city and State of New York, as are also all its other executive officers. Its principal office and place of business, including its treasury, is in the city and State of New York. In the year 1888 there were outstanding bonds, or other evidences of indebtedness of the company, to the amount of $78,573,485.10. All these evidences of indebtedness were originally created and issued by the company under authority conferred upon it by the Legislature of the State of New York. They were all of them issued, sold and delivered, either in the city of New York, or in London, England, to non-residents of Pennsylvania. By the terms of the bonds the principal is payable in the city of New York, and the interest is payable either in said city or in London, where the company has also an agency for that purpose. It is, however, paid principally at the treasury of the company in the city of New York. The interest is represented by coupons, which are separated from the bonds and presented for payment at the office of the company in the city of New York, by banks, bankers and their messengers on behalf of themselves and their correspondents in other cities, by whom the coupons have been transmitted, either as cash or for collection. The persons presenting the coupons seldom know the residence of the owner of the bond from which any particular coupon has been detached, or, if they do know, they refuse to disclose it.

It frequently happens that sometimes as many as twenty thousand coupons are presented to the company for payment in a single day. It is impossible for its treasurer to know, upon presentation of any coupon, whether or not the bond, from which it was detached, is owned by a resident of Pennsylva-

nia. The bonds issued by the company are widely scattered, being held largely abroad, and in various States of the Union. It would require months of labor and a corps of assistants to determine the ownership of the bonds upon any semi-annual interest period, if indeed it could be definitely ascertained at all. To make the necessary inquiry would require the suspension of payment of all of the coupons ; but the refusal of the treasurer of the company to pay coupons upon presentation would subject the company to the risk, expense and loss of credit of having them protested for non-payment. It would indeed throw the company into bankruptcy.

The treasurer of the company, in paying the interest maturing in 1888, could not, therefore, and did not, ascertain what bonds, if any, were owned by residents of Pennsylvania. He did not assess any Pennsylvania State tax upon any of the bonds, and he did not deduct any such tax, but paid the interest upon all the bonds in full. He did, however, out of respect for the requirements of the Auditor General of Pennsylvania, make to him a detailed report of the indebtedness of the company, stating that none of the evidences of such indebtedness were known to be owned by residents of Pennsylvania, and protesting that in any event it was neither competent nor legal for the State of Pennsylvania to require this company, being a corporation of the State of New York, or its treasurer, a resident of said State, when paying interest in the city of New York upon bonds issued in said city, under authority of the charter granted by said State, to act as agent of the State of Pennsylvania for the assessment and collection of taxes imposed by law upon the holders of the bonds and that the deduction of a tax from the interest due by the Company would impair the obligation of contracts. He further stated in such protest that the officers of the company did not know that any of the bonds were owned in the State of Pennsylvania, but had reason to believe that they were nearly all owned by non-residents; and that so far as any inference could be drawn from the manner in which, or the persons by whom, the interest was collected, such inference was that all of said bonds were owned by non-residents of Penn-

sylvania. (Record p. 11–14). Upon receipt of this report the Auditor General settled an account against the company itself for a tax of three mills upon the entire amount of its outstanding bonds, said tax, after the allowance of a treasurer's commission, amounting to $234,490.86 (Record p. 16). From this account the company appealed in the manner provided by law to the Court of Common Pleas of Dauphin county (Record p. 7). By agreement the case was heard by the Court without the intervention of a jury, the Court finding both the law and the facts. Upon the trial of the case the testimony of the officers of the company was offered, showing the result of an extended examination made after the filing of the report above mentioned. Although it did not positively appear that any bonds were so held at the time of payment of interest, the Court, nevertheless, found as a fact that $841, 000 were at some time in the year 1888 owned by individuals residing in Pennsylvania, and judgment was entered in favor of the Commonwealth for the amount of tax thereon. Both parties appealed from said judgment to the Supreme Court of Pennsylvania, the Commonwealth insisting upon the full amount of her claim, and the company denying any liability whatever. That Court affirmed the judgment of the trial court; whereupon this writ of error was taken.

Among the propositions formally presented to, and overruled by, the Court of Common Pleas of Dauphin County and the Supreme Court of Pennsylvania, were the following:

That as the act of 1885 imposes the duty of assessing and collecting the tax upon the treasurer of the corporation, there is no authority of law for the demand made upon the corporation itself.

That it is not within the constitutional authority of the State of Pennsylvania to impose upon a corporation of the State of New York, or upon its treasurer, being a resident of said State, the duty of ascertaining the residence of the owners, and of assessing and collecting in said State a tax upon bonds and mortgages issued, sold and delivered in said State of New York, nor to hold the company or its treasurer responsible for failure to so assess and deduct the same from interest

paid upon said bonds and mortgages in the city and State of New York, and therefore, the act of June 30, 1885, if construed to authorize the claim in question, is void, because in violation of a necessary implication of the Constitution of the United States, which confines the power of each State to subjects within its territorial sovereignty, and by reason of which all subjects over which the sovereign power does not extend, are exempt from taxation, regulation or control by said State.

That the act of 1885, by requiring the withholding of a portion of the interest due to the holders of bonds issued by the company, impairs the obligation of the contract between the company and its bondholders, and is, therefore, in conflict with section 10 of Article I. of the Constitution of the United States.

That by imposing upon the company conditions not contained in the legislation of Pennsylvania in pursuance of which the railroad of the company was constructed through a portion of said State, it impairs the obligation of the contract contained in said legislation.

That by compelling the company to withhold a portion of the interest due upon its bonds, it impairs the obligation of the charter contract between the company and the State of New York in pursuance of which said bonds were issued.

That an interest coupon, when detached from a bond, is a separate and distinct contract, and that by compelling the company to withhold from the amount due upon the coupon presented by one person, a tax due upon the bond from which said coupon had been detached, said bond belonging to a different person, the act impairs the obligation of the contract between the corporation and the holder of the coupon, and is, therefore, in conflict with section 10 of Article I. of the Constitution of the United States.

That the business of the company, so far as Pennsylvania is concerned, consisting chiefly of the transportation of freight and passengers into, out of, or through said State, the act of June 30, 1885, is unconstitutional and void as attempting to regulate or impose conditions upon the transaction of such inter-State business.

That the tax sought to be imposed upon the holders of bonds under the act of 1885 is in violation of section 1 of Article XIV. of the Amendments to the Constitution, and its collection cannot therefore be enforced, either against the bondholders or the corporation.

The reasons given by the Supreme Court of Pennsylvania for its decision do not appear in its brief opinion, filed in No. 591 (Record, p. 50), but are found in the opinion filed in the case which is now No. 75, reported in *Com.* vs. *N. Y., L. E. & W. R. R. Co., 129 Pa., 463.* For convenience of reference, the syllabus of that case and the opinion of the Court are printed in full, commencing on the next page hereof.

COM. *v.* N. Y., L. E. & WESTERN R. R. CO., 129 PA., 463

Syllabus of the Case.

1. Section 4, act of June 30, 1885, P. L. 193, requiring corporations, upon the payment of interest upon their corporate indebtedness, to deduct and return the State tax imposed, applies not only to domestic corporations, but to foreign corporations doing businsss in this State.

2. A corporation of one State cannot do business in another State without the latter's consent, express or implied, and that consent may be accompanied with such conditions as the latter may impose, not unconstitutional in character and effect and inconsistent with jurisdictional authority.

3. It is competent for the Legislature of Pennsylvania to impose upon foreign corporations doing business in this State the duty, upon the payment of interest upon their corporate bonds held by resident holders, to deduct and return the State tax imposed by section 4, act of June 30, 1885, P. L. 193.

4. The New York, L. E. & W. R. Co. is not relieved from this duty to collect and return said tax, or from liability therefor upon failure to perform such duty, by anything authorized, conferred, or required in the acts of February 16, 1841, P. L. 28, and March 26, 1846, P. L. 179.*

5. Other questions, relating to the constitutionality, etc., of said act of June 30, 1885, P. L. 193, are ruled by *Commonwealth* vs. *Delaware Div. Canal Co.*, *123 Pa.*, *594*, and the appeals in *Commonwealth* vs. *Lehigh V. R. Co.*, *ante*, *429*.

Opinion of Supreme Court of Pennsylvania.

Mr. Justice Clark:

This case came into the Common Pleas of Dauphin county upon an appeal from a settlement made by the Auditor General, etc., for State taxes on corporate loans, under the fourth section of the act of June 30, 1885, for the year 1887. It was tried by the court by agreement of the parties under the act of 1874. The learned judge of the court below found as matter of fact that $2,378,000 of the company's bonds were

*See these Statutes printed commencing on page 15 hereof.

owned and possessed by residents of Pennsylvania, of which $852,000 were held by individuals, and the residue by corporations. The principal questions raised on this record are ruled by *Commonwealth* v. *Delaware Div. Canal Co.*, *123 Pa.*, *594*; *Lehigh Valley R. Co.* v. *Commonwealth*, and *Commonwealth* v. *Lehigh Valley R. Co.*, the last two cases decided at this term and not yet reported (*ante*, *429*). The only remaining question for our consideration is, whether or not the defendant company, being a foreign corporation, is liable to be charged with State taxes at the rate of three mills on the dollar on their bonds held by individuals and firms resident within the State, as above stated.

The New York, Lake Erie and Western Railroad Company is a corporation of the State of New York. It was originally incorporated in the year 1832, as the New York and Erie Railroad Company, with power to construct a railroad from the city of New York to Lake Erie, through the southern counties of the State of New York. To avoid certain engineering difficulties, the company was afterwards authorized by the Legislature of Pennsylvania, under certain restrictions, to build a specific portion of its road through the counties of Pike and Susquehanna, in this State: Acts of February 16, 1841, P. L. 28, and March 26, 1846, P. L. 179; the said company, by the act of 1846, being required to pay to the State of Pennsylvania, after the completion of the road, the sum of $10,000 annually. The property and franchises of the New York and Erie Railroad Company afterwards became vested in the Erie Railway Company, and, in 1878, in the New York, Erie and Western Railroad Company. A portion of the defendant's road was made and is still maintained within the limits of this State, and since the completion and equipment of the road regular payment has been made by the company to the Commonwealth of the said sum of $10,000 annually, pursuant to the provisions of the several acts of Assembly already referred to. Although a corporation of another State, and, therefore, a foreign corporation, the company is doing business in this State. By a certificate filed in the office of the Secretary of the Commonwealth, pursuant to the

act of 22d April, 1874, the defendants have designated a place of business and an agent to represent them ; they are, therefore, not only duly authorized but, in the operation of their road, they are actually engaged in doing business within the limits of this State.

The fourth section of the act of 1885 applies not only to all private corporations, created by and under the laws of this State or of the United States, but to such as are doing business in this Commonwealth. The several questions raised by the assignments of error, from the first to the ninth, inclusive, as we have already said, have been discussed and decided in the case of *Commonwealth* v. *Delaware Div. Canal Company*, *123 Pa., 594*, and the case of *Commonwealth* v. *The Lehigh Valley Railroad Company*, argued at the present term, (ante, 429), and will not be further considered here.

The only questions raised by the remaining assignments are, first, whether the provision of the fourth section of the act of 1885, so far as it applies to foreign corporations doing business in this State, is a proper exercise of legislative power; and, second, assuming this to be so, whether there is anything in the said provision, by which the defendant road was permitted to pass through the counties of Pike and Susquehanna, which would exempt the company from the obligation of this act.

Upon the first question suggested there can, we think, be but little room for discussion. In the Delaware Div. Canal Company case, already referred to, we said:

"Foreign corporations, exercising their franchises under the laws of other States and countries, are beyond the reach of our processes of taxation. We could not require them ordinarily to comply with any such regulation of our law, and, therefore, they are necessarily excluded from the provisions of the act. Such foreign corporations as are engaged in business in the State might, doubtless, be required to comply as a condition of their right so to do, but this could only embarrass the action of the local assessor, and upon this ground, doubtless, they were wisely excluded from the operation of the act."

The last member of the concluding sentence of the paragraph quoted is a mere inadvertance. The fourth section of

the act of 1885 does in terms embrace such foreign corporations as are engaged in business in this State, and the question now to be considered is, whether or not such a provision as respects the New York, Lake Erie and Western Railroad Company is a proper exercise of the legislative power of the State. The general statement that foreign corporations are ordinarily beyond the reach of our processes of taxation is undoubtedly correct, but when a foreign corporation comes into Pennsylvania and engages in business here, undoubtedly it does so subject to the general policy of, and the course of legislation in, the State: *Runyon* v. *Coster*, *14 Pet.*, *122*. A foreign corporation can exercise its franchises in Pennsylvania only so far as it may be permitted by the local sovereign. The right rests wholly in the comity of the States: *Paul* v. *Virginia*, *8 Wall.*, *168*. A corporation of one State cannot do business in another State without the latter's consent, express or implied, and that consent may be accompanied with such conditions as the latter may think proper to impose: *St. Clair* v. *Cox*, *106 U. S.*, *350*. These conditions will be valid and effectual, provided they are not repugnant to the constitution or laws of the United States, inconsistent with the jurisdictional authority of the State, or in conflict with the rule which forbids condemnation without opportunity for defense: *Lafayette Insurance Co.* v. *French*, *18 How.*, *404*; *Doyle* v. *Insurance Co.*, *94 U. S.*, *535*; *Pembina Mining Co.* v. *Pennsylvania*, *125 U. S.*, *181*.

It was competent for the Legislature of Pennsylvania to impose as a condition upon foreign corporations doing business in this State that they shall assess and collect the tax upon that portion of their loans in the hands of individuals resident within this State, and otherwise comply with the provisions of the act of 1885. The act imposes no tax upon the company; it simply defines a duty to be performed and fixes a penalty for disregard of that duty. The Legislature having so provided, compliance with the act may, in some sense, be said to form one of the conditions upon which corporations may do business within the State, and the corporation continuing its business subsequently would be taken to have assented thereto.

There is, however, a condition, implied even in the case of domestic corporations, that they will be subject to such reasonable regulations, in respect to the general conduct of their affairs, as the Legislature may from time to time prescribe, and such as do not materially interfere with or obstruct the substantial enjoyment of the privileges the State has granted: *Chicago v. Needles, 113 U. S., 574.* If this be so as to corporations who are entitled to their charter privileges upon the footing of a contract, how much the more is it so as to corporations who are merely permitted by the Legislature to do business within this State as a matter of grace and not of right? But it is said that the enforcement of the fourth section of the act of 1885 against the defendant corporation would impair the obligation of the contract existing between the Commonwealth and the company, as set forth in the private statutes of 1841 and 1846 already referred to. Apart from these statutes the defendant had the right by the comity of the States to contract and to sue within the State of Pennsylvania, but could exercise no extraordinary franchises or special privileges granted by the State incorporating it, as, for instance, the right to eminent domain, or the privilege of exemption from taxation: *State* v. *Boston, etc., R. Co., 25 Vt., 433; Middle Bridge Co.* v. *Marks, 26 Me., 326; Taylor on Corp., 386.* It was for the exercise of this extraordinary privilege and power of the State the annual payment of $10,000 was stipulated. There is nothing in the act to indicate that this sum was paid in lieu of taxes, or for exemption from any duty which might otherwise be imposed upon the company, but for the privilege of exercising the right of eminent domain in the location of their road through the counties mentioned, under restrictions particularly specified. The effect of these acts of 1841 and 1846 was not to declare the company a corporation of the Commonwealth, but, as Mr. Justice Thompson said in *New York & Erie R. Co.* v. *Young, 33 Pa., 175*, "for the purposes of these acts the rights involved are to be tested and judged by the same rules of law as if the company had been primarily incorporated by this Commonwealth. So far as the road runs through this State under the privileges granted to

it, the company is a *quasi* Pennsylvania corporation. The right of eminent domain, within the restrictions of the grant, was as fully conferred on them by the act of February 16, 1841, as it ever is conferred on corporations exclusively within the State, and their rights and duties under the privileges granted must be ruled by the same principles." One State may make a corporation of another State, as there organized and conducted, a corporation of its own, *quoad* property within its territorial jurisdiction: *Railroad Co.* v. *Harris, 12 Wall., 65–82; Graham* v. *Railroad Co., 118 Pa.* (?), *168.* Thus it will be seen that the defendant exercises powers and franchises which they have received directly from the legislation of Pennsylvania; that a part of their property is actually within the limits of this State, and receives the protection of our laws, and there is no good reason why the company should not be held subject to the same regulations as corporations of our own State. We are of opinion that on this branch of the case the Court was right.

The judgment is affirmed.

PENNSYLVANIA STATUTE OF 1841.

AN ACT

To authorize the New York and Erie Railroad Company to construct said road through a portion of Susquehanna county, in the State of Pennsylvania.

WHEREAS, The legislature of the state of New York did at their session of one thousand eight hundred and thirty-two constitute a body corporate by the name of "the New York and Erie railroad company," with power to construct a single, double or treble railroad or way from the city of New York to Lake Erie through the southern tier of counties in said state.

WHEREAS, It is represented that in one of said counties to wit: the county of Broome, bordering on the state of Pennsylvania, said company are opposed in their construction of said road, by a mountain of such magnitude as to require tunneling or to be surmounted by stationary power with immense expense to said company.

WHEREAS, It is also represented that by being permitted in the construction of said road to follow the valley of the Susquehanna river, a distance of about fifteen miles in the neighborhood of and near to said county of Broome (though within the state of Pennsylvania) said company might enjoy the advantages of a level and easy route.

And whereas, It is alike politic and just that amity between adjoining states in respect to their internal improvement operations should be respected and maintained. Therefore,

SECTION 1. *Be it enacted by the Senate and House Representatives of the Commonwealth of Pennsylvania in General Assembly met and it is hereby enacted by the authority of the same*, That the New York and Erie railroad company incorporated by the legislature of the state of New York at their session of eighteen hundred and thirty-two, shall have full power to extend their road through such portion of the county of Susquehanna as in the proper construction of their road they may find it necessary.

SECTION 2. The president and managers of said company shall have power to survey, lay down, ascertain, mark and fix such route as they shall deem expedient for the extension or continuation of their said road with single, double or treble track, confining themselves to the said county of Susquehanna; and the said railroad shall not pass through any burial ground, place of public worship or dwelling house, without the consent

of the owner and the said company shall, within six months after ascertaining the route of said railroad, cause an accurate survey of the lines of said road to be made, a map or plot of which survey they shall cause to be filed in the office of the secretary of state, which map or plot or certified copy thereof shall be sufficient evidence of the route of said road which may then be opened, and all the expenses thereof shall be defrayed by said company.

SECTION 3. That the said company shall have power, by themselves or agents, to enter in and upon such lands as may be necessary to make the railroad aforesaid, and also have liberty of taking from any land in the neighborhood, gravel, stone, wood or other materials necessary for the construction of said railroad, paying, if the owner of said land and said company can agree, the damages they shall do to said lands or if they cannot agree, thereon, the damages shall be ascertained in the manner hereafter prescribed as to the compensation for injuries done said lands over which said railroad shall be laid.

SECTION 4. That whenever it shall be necessary for the said company to enter in and upon and occupy for the purpose of making of said railroad, any land upon which the same may be located, if the owner or owners of said land shall refuse to permit such entry and occupation and the parties cannot agree upon the compensation to be made for any injury or supposed injury that may be done to said land by such entry and occupation, then it shall be lawful for the court of common pleas of the county in which the land lies, on application of either party and at the cost and charges of said corporation, to award a *venire* directed to the sheriff of the county, requiring him to summon a jury of six disinterested men to view, examine and survey the said lands, tenements or hereditaments, and estimate the injury or damages, if any, that in their opinion will be sustained as aforesaid by reason of said railroad, and report the same, under their oaths and affirmations, to the said court, which report being confirmed by the said court, judgment shall be entered thereon, and the said sheriff and jurors shall be entitled to the like fees for their services as are allowed by law in other cases of special injuries to be paid by the said company ; and it shall be the duty of the said jury in estimating such injury or damages, to take into consideration the advantage that will be derived to the owner or owners of such lands from the construction of said railroad: *Provided*, That either party may appeal to the court within thirty days after such report shall have been filed in the prothonotary's office of the proper county, in the same manner as appeals are allowed in other cases ; and upon the filing of such report or inquisition

and the confirmation thereof or upon final judgment upon appeal therefrom and the said company paying to such owner the amount in said report or judgment specified in full compensation for the injury sustained as aforesaid, the said company shall have the right of way and all other rights and privileges necessary to the full enjoyment of said road over the lands which the owner held; and they and all who act under them shall be acquitted and freed from all responsibility for or on account of such injury: *Provided*, That the payment of damages aforesaid for the lands through which the said road may be laid, shall be made before the said company or any person under their direction or in their employ shall be authorized to enter upon or break ground in the premises, except for the purpose of surveying and laying out said road unless the consent of the owner or owners be first obtained.

SECTION 5. That the said railroad shall be so constructed as not to impede or obstruct the free use or passage of any public road or roads which may cross or enter the same, and in all cases where the said railroad may cross or in any manner interfere with any existing public road, the said company shall make or cause to be made a good or sufficient causeway or causeways to enable all persons passing or traveling said public roads to cross and pass under or over said railroad; and if the said company shall neglect or refuse to keep such way or causeways in good repair, they shall be liable to a penalty of ten dollars for every day the same shall be so neglected or refuse to be repaired, to be recovered by the supervisors of the township with costs for the use of the township as debts of the like amount are by law recoverable, and shall moreover be liable to all actions at the suit of any person who may be aggrieved thereby.

SECTION 6. That for the accommodation of all persons owning or possessing lands through which the said railroad may pass, it shall be the duty of the said company to make or cause to be made, a good and sufficient causeway or causeways, wherever the same may be necessary, to enable the occupant or occupants of said lands, to cross or pass over the same with wagons, carts, and implements of husbandry as occasion may require; and the said causeway or causeways when so made, shall be maintained and kept in good repair by said company; and if the said company shall neglect or refuse, on request, to make such causeway or causeways, or, when made, to keep the same in good order, the said company shall be liable to pay any person aggrieved thereby, all damages sustained by such persons in consequence of neglect or refusal, to be paid for and recovered before any magistrate or court having cogniz-

ance thereof: *Provided*, That the said company shall in no case be required to make or cause to be made, more than one causeway through each plantation or lot of land, for the accommodation of any one person owning or possessing land through which said railroad may pass; and when any public road shall cross said railroad, the person owning or possessing land through which said public road shall pass, shall not be entitled to require the company to erect or keep in repair any causeway or bridges, for the accommodation of the occupant of said land.

SECTION 7. No suit or action shall be brought or prosecuted by any person or persons for any penalties incurred under this act, unless each suit or action shall be commenced within ten months next after the offense shall have been committed, or the cause of action shall have accrued; and the defendant or defendants in such suit or action may plead the general issue, and give this act and the special matter in evidence, and that the same was done in pursuance and by authority of this act.

SECTION 8. If any person or persons shall wilfully and knowingly break, injure, or destroy the railroad or any part thereof to be erected by the said company, in pursuance of this act, he, she, or they shall forfeit and pay to the said company, three times the actual damages so sustained, to be sued for and recovered with costs of suit, in any court having cognizance thereof, by action of debt, in the name and for the use of said company.

SECTION 9. That in all suits or actions which may be brought against said company, the service of process upon any manager, toll-gatherer, or other officer of the company, shall be as good and available in law as if made on the president thereof. And the said company shall at all times keep at least one manager, toll-gatherer, or other officer, a resident in the county of Susquehanna.

SECTION 10. All transportation on the said railroad, of whatever nature or kind, shall be carried on and conducted under the superintendence and direction of said company, who shall make rules for the regulation of all travelling and transportation on the same, and alter the same as they may deem expedient: *Provided*, That in the transportation of property or persons on said railroad, the citizens of this Commonwealth shall enjoy equal privileges with those of the State of New York.

SECTION 11. If any buildings, fences, timber or other property, situated in the county of Susquehanna, shall be destroyed by fire occasioned by sparks falling from any of the locomotive engines used upon the said road, the company shall be liable

to make full compensation for all damages sustained in consequence of such fire. The damage thus sustained, to be ascertained (where the parties cannot agree) in the same manner that other damages are ascertained and assessed, agreeably to the provisions of the fourth section of this act.

WM. A. CRABBE,
Speaker of the House of Representatives.
CHARLES B. PENROSE,
Speaker of the Senate.

APPROVED—The sixteenth day of February, A. D. eighteen hundred and forty-one.

DAVID R. PORTER.

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PENNSYLVANIA STATUTE OF 1846.

A SUPPLEMENT

To an act, entitled, "An Act to authorize the New York and Erie Railroad Company to construct said road through a portion of Susquehanna county, in the State of Pennsylvania," passed the sixteenth day of February, one thousand eight hundred and forty-one.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same,* That the act, entitled, "A supplement to an act, entitled, 'An act to authorize the New York and Erie Railroad Company to construct said road through a portion of Susquehanna county, in the state of Pennsylvania, passed sixteenth of February, eighteen hundred and forty-one," be and it is hereby amended, so as to authorize the said New York and Erie Railroad Company, to extend the line of their said railroad from a point near the village of Port Jervis, in Orange county, state of New York, across the Delaware river, into the county of Pike, and thence up the valley and near the shore of said river, within the said county, a distance not exceeding thirty miles, to a point not exceeding ten miles above the mouth of the Lackawaxen river; and thence to re-cross the Delaware river to the easterly side thereof, in the county of Sullivan, state of New York; *Provided,* That the said road shall re-cross the Delaware river, into the State of New York, not less than three nor more than ten miles above the mouth of the Lackawaxen river; *And provided further,* That it shall be so constructed on the Pennsylvania shore as not to impede or obstruct the Delaware and Hudson Canal Company, in the

erection of an aqueduct across the Delaware river, at or near the mouth of the Lackawaxen ; *And provided further*, That said road shall be so constructed as not to obstruct the rafting navigation, nor contract the natural flow and expansion of the said Delaware river at high floods ; nor shall the said railroad company in any manner disturb or injure the works, or impede the business of the Delaware and Hudson Canal Company; *Provided also*, That the said New York and Erie railroad shall cross the Delaware river into said county of Pike, at some point between Carenter's point and the Glass house: *Provided also*, That the said New York and Erie railroad company shall permit a connection at or near Carpenter's point, in the county of Pike, with any railroad company now chartered, or hereafter to be chartered by this state.

SECTION 2. All the restrictions, prohibitions, privileges, and provisions contained in the act to which this is a supplement, relating to the road therein authorized to be constructed in the county of Susquehanna, are hereby made applicable to the road herein authorized to be built in the county of Pike; and the said New York and Erie railroad company shall at all times keep at least one manager, toll gatherer or other officer, a resident in the said county of Pike, in addition to the one directed in the aforesaid act to be kept in the county of Susquehanna.

SECTION 3. That this act shall not take effect, until the legislature of the state of New York shall authorize, if not already authorized by them, and the said New York and Erie Railroad Company shall consent to a connection with the Blossburg and Corning railroad at or near Corning ; and also, a connection with the Williamsport and Elmira railroad at or near the village of Elmira ; *Provided*, That so far as relates to passengers or tonnage destined to or received from the State of Pennsylvania, said company shall so regulate their tolls and charges for motive power and transportation of said roads that they shall at no time be greater per passenger or per ton per mile on that part of their road west of Elmira, than may be charged per passenger or per ton for the same description of goods or merchandise transported over and an equal distance of said road east of Elmira ; and the said company shall so conduct and regulate the travel on their road, whether it be with their own locomotives, cars, or other means of transportation used on said road, by their agents, contractors, or other persons, that, a convenient opportunity shall be given at all points of intersection, for persons or tonnage travelling or transported on the said road, or on such railroads or other improvements as may connect with said road, to pass to or from such rail-

roads or other improvements connecting with said road, so that equal facilities shall be given for passengers or things to pass from or to said connecting roads, or other improvements, as shall be extended to passengers or things that are to be transported over the entire length or any portion of said road; *And provided*, That the said New York and Erie railroad company shall so regulate their tolls, that the charge on anthracite and bituminous coal shall not exceed one and a half cents per ton per mile.

SECTION 4. That full right and privileges are hereby reserved to the legislature of this commonwealth, to authorize any company or companies that are now, or may hereafter be incorporated, for the construction of any railroad or canal to connect with the said New York and Erie railroad, at any point or place within the state of Pennsylvania.

SECTION 5. That it shall be the duty of the president and managers of said company, as soon as said railroad shall have been completed through Susquehanna and Pike counties, Pennsylvania, to prepare a full and accurate account of the costs of that portion of said road with the territory of this State, authenticated by the oath or affirmation of the president and secretary of said company, and communicate the same to the Auditor General of this commonwealth, who shall file the statement in his office. That after said railroad shall have been completed and in operation to Dunkirk, or shall have connected at the western end with any other improvement extending to Lake Erie, said company shall cause to be paid into the treasury of this state, annually, in the month of January, ten thousand dollars; and any neglect or refusal by said company to pay as aforesaid, shall work a forfeiture of the rights and privileges granted by this act.

SECTION 6. That the stock of said company to an amount equal to the costs of the construction of that part of their road situate in Pennsylvania, shall be subject to taxation by this commonwealth, in the same manner, at the same rate as other similar property is, or may be subject; and it shall be the duty of the said company to cause their treasurer to pay into the treasury of this state any tax to which said proportion of stock is liable; and the said company shall annually, in the month of January, make a statement to the legislature, under the oath or affirmation of the president thereof, of its affairs, and the business done upon said road during the previous year; said statement to contain a full and accurate account of the number of passengers, amount and weight of produce, merchandize, lumber, coal and minerals transported on said road, east of Dunkirk and west of Piermont.

SECTION 7. That if the said company shall misuse or abuse the privileges hereby granted, or shall violate any of the privlieges of this act, the legislature reserves the right to repeal this act; and for the purpose of ascertaining whether the provisions of this act have been misused, abused, or violated, it shall be lawful for the legislature to direct, or the governor to order a *scire facias*, to be issued out of the supreme court of Pennsylvania, which shall be served upon the president or any officer or agent of said corporation, at least twenty days before the commencement of the term of said court, calling on the said corporation to show cause wherefore the act hereby granted shall not be declared null and void, and the same may be proceeded into final judgment in the manner now authorized by law in relation to writs of *quo warranto*.

FINDLAY PATTERSON,
Speaker of the House of Representatives.
DANIEL L. SHERWOOD,
Speaker of the Senate.

APPROVED—The twenty-sixth day of March, one thousand eight hundred and forty-six.

FRS. R. SHUNK.

III. ASSIGNMENT OF ERRORS.

I. The learned Court erred in not sustaining the company's fifth exception to the decision of the Court of Common Pleas of Dauphin County, viz :

"The learned Court erred in not finding as a conclusion of law that the act of June 30, 1885, and particularly the fourth section thereof, is unconstitutional and void because in conflict with Article V. of the Amendments to the Constitution of the United States, which provides that 'No person shall be . . . deprived of life, liberty or property without due process of law.'"

II. The learned Court erred in not sustaining the company's sixth exception to the decision of the Court of Common Pleas of Dauphin County, viz :

"The Court erred in not finding as a conclusion of law that the act of June 30, 1885, and particularly the fourth section thereof, is unconstitutional and void because in conflict with section 1 of Article XIV. of the Amendments to the Constitution of the United States, which provides that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty nor property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'"

III. The learned Court erred in not sustaining the company's seventh exception to the decision of the Court of Common Pleas of Dauphin County, viz :

"The Court erred in not finding as a conclusion of law that the act of June 30, 1885, impairs the obligation of the charter contract between the company and the State of New York in pursuance of which its bonds and mortgages were issued, and is therefore, void, because in conflict with section 10 of Article I. of the United States, which forbids any State to pass any law 'impairing the obligation of contracts.'"

IV. The learned Court erred in not sustaining the company's eighth exception to the decision of the Court of Common Pleas of Dauphin County, viz :

"The Court erred in not finding as a conclusion of law that the act of June 30, 1885, impairs the obligation of the contract contained in the legislation of the State of Pennsylvania, in pursuance of which the railroad of said company was constructed through a portion of said State, and is, therefore, void, because in conflict with section 10 of Article I. of the Constitution of the United States."

V. The learned Court erred in not sustaining the company's ninth exception to the decision of the Court of Common Pleas of Dauphin County, viz :

"The Court erred in not finding as a conclusion of law that the act of June 30, 1885, impairs the obligation of the contract between the company and its creditors, and is, therefore, void, because in conflict with section 10 of Article I. of the Constitution of the United States."

VI. The learned Court erred in not sustaining the company's tenth exception to the decision of the Court of Common Pleas of Dauphin County, viz :

"The Court erred in not finding as a conclusion of law that it is not within the constitutional authority of the State of Pennsylvania to impose upon a corporation of the State of New York, or upon its treasurer, being a resident of the State of New York, the duty of assessing in the State of New York, a tax upon bonds and mortgages issued and sold in the State of New York upon the payment of interest made in the city of New York, nor to hold the said company or its treasurer responsible for failure so to assess and to deduct the same from interest paid upon said bonds and mortgages in the city and State of New York, and the act of June 30, 1885, if it shall be construed to authorize the account settled by the Auditor General in this case, or any part thereof, is void because in violation of a necessary implication of the Constitution of the United States, which confines the power of each State to tax subjects within its territorial sovereignty, and by reason of which all subjects over which the sovereign power of a State does not extend are exempt from taxation or control by said State."

VII. The learned Court erred in not sustaining the company's eleventh exception to the decision of the Court of Common Pleas of Dauphin County, viz:

"The learned Court erred in not holding that, in so far as it applies to the New York, Lake Erie and Western Railroad Company, the fourth section of the act of June 30, 1885, is unconstitutional and void, because in conflict with that provision of the Constitution of the United States which confers upon Congress the power 'to regulate commerce with foreign nations and among the several States and with the Indian tribes.'"

VIII. The learned Court erred in not sustaining the company's twelfth exception to the decision of the Court of Common Pleas of Dauphin County, viz:

"The learned Court erred in not holding as a conclusion of law that, in so far as it requires the corporation to deduct from the amount due upon a coupon owned or presented by one person, the tax due upon the bond from which said coupon has been detached, the said bond belonging to a different person, the act of June 30, 1885, is unconstitutional and void, because impairing the obligation of the contract between the corporation and the holder of the coupon, and therefore in conflict with section 10 of Article I. of the Constitution of the United States."

IX. The learned Court erred in affirming the judgment of the Court of Common Pleas of Dauphin County in favor of the Commonwealth of Pennsylvania and against the New York, Lake Erie and Western Railroad Company.

X. The learned Court erred in not reversing the judgment of the Court of Common Pleas of Dauphin County.

ARGUMENT OF PLAINTIFF IN ERROR.

By agreement of the parties, under the Pennsylvania Statute of April 22, 1874 (P. L. 109), this case was heard by the Court of Common Pleas of Dauphin county without the intervention of a jury, the Court finding the facts as well as the law. The facts thus found by the trial court are conclusive and final.

"Where a cause is submitted to the decision of the Court below without a jury, under the act of April 22, 1874, the findings of fact under such a submission are no more reviewable by the Supreme Court than is the verdict of a jury." *Com.* v. *Westinghouse El. & Mfg. Co., 151, Pa., 265.*

See also—

Jamison v. *Collins, 83 Pa., 359.*
Lee v. *Keys, 88 Pa., 175.*
Brown v. *Dempsey, 95 Pa., 243.*
Com. v. *Lehigh Valley R. R. Co., 104 Pa., 89–97.*
Bradlee v. *Whitney, 108 Pa., 362.*
R. R. Co. v. *Moyer, 125 Pa., 506.*
Com. v. *Hulings, 129 Pa., 317.*

The facts thus found by Judge Simonton, the learned President of the trial court, in his opinion first filed, were as follows (Record, p. 33-34):

"1. Defendant is a corporation, chartered by the State of New York, and having its principal office and place of business in the city of New York. It has and exercises the right of way, under a special act of the Legislature of the State of Pennsylvania, to run its railroad for somewhat more than thirty miles through the State of Pennsylvania, for which it pays annually to the State the sum of ten thousand dollars.

"2. The settlement appealed from is based upon a report made by the treasurer of defendant to the Auditor General of Pennsylvania for the year 1888, which contains a detailed statement of the several issues of bonds, scrip and certificates of indebtedness by defendant and the corporation

whose successor it is, amounting in all to $78,573,485.10, in which it is stated that none of the indebtedness is known to be owned by residents of Pennsylvania, and that it is believed by the officers of the company that nearly all is owned by non-residents of Pennsylvania.

"3. In the settlement appealed from defendant is charged with tax upon the nominal value of all scrip, bonds and certificates of indebtedness issued by it and the corporation whose successor it is, and owing by it, amounting to the sum of $78,573,485.10, as stated in said report.

"4. All the evidences of indebtedness owing by defendant were created and issued under authority granted by the Legislature of the State of New York, and were issued, sold and delivered in the city of New York, in said State, or in London, England, and the interest accruing from time to time thereon is payable and paid in said city of New York and in London. The right to the interest is evidenced by coupons payable to the bearer, which, when due, are separated from the bonds and are presented for payment at the office of defendant in the city of New York by banks, bankers and their messengers on behalf of themselves and their correspondents in other places, by whom the coupons have been transmitted, either as cash or for collection; and it is practically impossible for the treasurer or other officers of defendant, at the time the coupons are presented, to ascertain the residence of the owner of the bonds from which they have been separated, because of the large number of coupons presented at the dates when they become due, the whole number of coupons due semi-annually amounting to more than one hundred and fifty thousand, and as many as twenty thousand being presented in a single day; and for the further reason, that the bankers and their messengers, when they present the coupons, in very many instances do not know who are the owners of the bonds from which they have been detached, and could not be compelled to disclose if they did know, as the coupons are payable to bearer; and a refusal of the treasurer of the company to pay the coupons on presentation, except upon condition of the ownership being disclosed, would subject it to the risk and expense and loss of credit of having the coupons protested for non-payment.

"Some of the evidences of indebtedness are coupon bonds issued and payable to bearer, and others are coupon bonds

which may be registered or not at the option of the holders or owners.

"5. Holders of the evidences of indebtedness of defendant are entitled to vote for directors of this company, and a register is kept in the office of defendant, in which all holders of such evidences of indebtedness are required to register between sixty and thirty days prior to any election for directors at which they desire to vote. The register for the year 1888. shows an ownership of bonds to the amount of $28,562,700.00, of which we find that $338,000.00 were owned by residents of Pennsylvania, but this ownership does not appear on the register.

"6. A record of registered bonds is also kept in the office of defendant, and in 1888 there were registered $11,124,-300.00 in value of bonds. Of this amount $2,054,000.00 were owned by residents of Pennsylvania, $1,551,000.00 of which were owned by Pennsylvania corporations, leaving $503,000.00 which were owned by individual residents of Pennsylvania.

"7. There is no evidence in this case from which we could find that any particular bonds, other than those which make up the two amounts of $338,000.00 and $503,000.00, as above stated, were held and owned, during the year 1888, in Pennsylvania; nor is there any evidence tending to show that the treasurer of defendant, at the time the coupons were paid, could know that any, and if any, which of the coupons, other than those which belonged to the bonds above specified, belonged to bonds held or owned in this State; and we, therefore, do not find that there were any other bonds, or any greater amount of bonds, held in Pennsylvania, during the year for which the tax is claimed in this settlement, than the bonds specified in findings of facts numbers five and six."

In his opinion on exceptions, subsequently filed (Record pp. 44 and 45) he finds the following additional facts as requested in defendant's exceptions Nos. 1, 2 and 3, (Record p. p. 39 and 40):

"1. The treasurer of defendant is, and was, in 1888, a resident of the State of New York.

"2. The legislation of the State of New York constituting the charter of the company, and in pursuance of which the

bonds and mortgages were issued, is silent upon the subject of their taxation by the State of Pennsylvania, or the assessment or collection of a tax thereon by the company or its officers, and that the legislation of the State of Pennsylvania authorizing the construction of a portion of its road through a portion of said State is silent upon the subject of the taxation of the bonds and mortgages of the company, or of the collection of a tax thereon by the company or its officers.

"3. The railroad of defendant extends from New York city to Buffalo, a distance of 446 miles, and that, so far as the State of Pennsylvania is concerned, the business of the company consists chiefly in the transportation of freight and passengers from or to, or from and to, other States, into, out of or through the State of Pennsylvania."

The Commonwealth of Pennsylvania claims that upon this state of facts the company is liable for a tax of three mills upon the two items of $338,000 and $503,000 of bonds found by the Court to have been owned by residents of Pennsylvania in 1888, said liability being based upon the fourth section of the Pennsylvania statute of June 30, 1885, (P. L. 193,) which reads as follows:

"SECTION 4. That hereafter it shall be the duty of the treasurer of each private corporation, incorporated by or under the laws of this Commonwealth, or the laws of any other State, or of the United States, and doing business in this Commonwealth, upon the payment of any interest on any scrip, bond or certificate of indebtedness, issued by said corporation to residents of this Commonwealth, and held by them, to assess the tax imposed and provided for State purposes upon the nominal value of each and every said evidence of debt, and to report on oath, annually on the first Monday of November, to the Auditor General, the amount of indebtedness of the corporation owned by residents of this Commonwealth, as nearly as the same can be ascertained; and it shall be his further duty to deduct three mills on every dollar of the interest paid as aforesaid and return the same into the State treasury within fifteen days after the thirty-first day of December in each year; and his compensation for his services shall be the same that city and borough treasurers receive for similar services; and for every failure to assess and pay said tax and make report as aforesaid, the

Auditor General shall add ten per centum as a penalty to the amount of the tax; in payment of said tax by a corporation the bonds, certificates or other evidences of indebtedness issued by it shall be exempt from all other taxation in the hands of the holders of the same."

It was decided by this Court, in the case of the "*State Tax on Foreign-held Bonds*," (15 Wallace, 300,) that Pennsylvania had no authority to tax bonds, in the hands of non-resident owners, even though issued by her own corporations. The statute of 1885, therefore, limits the tax to bonds "issued by said corporation to residents of this Commonwealth and held by them." The company is required to report to the Auditor General those "owned by residents of this Commonwealth, as nearly as the same can be ascertained." None of the bonds of this company were issued to residents. But it is claimed that the duty sought to be imposed upon it, or its treasurer, is that of ascertaining what particular bonds of those representing its indebtedness of more than seventy-eight millions of dollars, were owned by residents of Pennsylvania at each semi-annual interest paying period, of assessing the Pennsylvania tax thereon, and of deducting the said tax from the interest due upon said bonds, and paying the same into the State Treasury. As opposed to this, it seems proper to present first in order the proposition contained in the sixth assignment of error, that—

It is not within the constitutional authority of the State of Pennsylvania to impose upon a corporation of the State of New York, or upon its treasurer, being a resident of the State of New York, the duty of assessing in the State of New York a tax upon bonds and mortgages issued and sold in the State of New York upon the payment of interest made in the city of New York, nor to hold the said company or its treasurer responsible for failure so to assess and deduct the same from interest paid upon said bonds and mortgages in the city and State of New York; and the act of June 30, 1885, if it shall be construed to authorize the account settled by the Auditor Gen-

eral in this case or any part thereof, is void because in violation of a necessary implication of the Constitution of the United States, which confines the power of each State to subjects within its territorial sovereignty, and by reason which of all subjects over which the sovereign power of a State does not extend are exempt from taxation or control by said State.

In the discussion of this proposition it is not necessary to consider the power of a State to tax property within her jurisdiction belonging to non-residents or to foreign corporations; nor the power of a State to regulate the business of foreign corporations so far as it is transacted within her borders; nor the power of a State to impose taxation upon bonds issued by a foreign corporation, said bonds being in the custody, possession and ownership of residents of the State. Conceding, for the purpose of the argument, that the State of Pennsylvania has the right to impose a tax upon such bonds, payable by the holders thereof, being her citizens, the question is, has she any extra-territorial jurisdiction, or have her laws any extra-territorial effect, to enforce the assessment collection and payment of the said tax? Can she compel a foreign corporation, or its non-resident treasurer, to perform, in another State, the duty of ascertaining what bonds, if any, are subject to taxation by reason of their ownership by residents of Pennsylvania? Can she impose upon such foreign corporation, or non-resident treasurer, the duty of assessing and collecting the tax upon such bonds so ascertained to be held by her citizens? Can she lay hold upon a fund which never was in Pennsylvania, but is located in the city of New York, and there set apart for the payment of interest, in accordance with the contract contained in the bonds, said contract having been made in the city and State of New York, under authority of the laws of said State? Has she power to direct that, in violation of the terms and obligation of the contract thus made in pursuance and authority of the laws of the State of New York, a portion of the interest payable in the city of New York

shall be withheld from the persons entitled by the terms of the contract to receive the same, and paid over into the Pennsylvania State treasury? Is it within her power and jurisdiction to hold this foreign corporation itself responsible for the amount of the tax due from such bondholders as were subsequently ascertained to have been residents of Pennsylvania in 1888, as a penalty for the failure of its treasurer to perform the duties of location, assessment and collection, and for his failure to retain from the holders of the bonds a portion of the interest which, by the terms of the contract between them and the company, as well as by the terms of the charter contract between the company and the State of New York, in pursuance of which said bonds were issued, they were entitled to receive? As already observed, this question, however stated, does not, in any way, involve the power of the State to tax, regulate or control persons, property or business, within her jurisdiction. It relates entirely to her attempted exercise of power and authority over persons, property and rights, entirely outside thereof.

Perhaps the highest and most necessary power which can exist in any State or sovereignty is that of taxation. But even that authority is confined within the territorial limits of the State or sovereignty attempting its exercise. In *Railroad Company* v. *Jackson*, *7 Wallace*, *262*, this court refused to allow the State of Pennsylvania to require the Northern Central Railway Company to deduct a tax from the interest due upon bonds owned by a non-resident alien, Mr. Justice Nelson, who delivered the opinion of the Court, saying (p. 268):

"Our conclusion on this branch of the case is, that to permit the deduction of the tax from the coupons in question would be giving effect to the acts of the Legislature of Pennsylvania upon property and interests lying beyond her jurisdiction."

In the "Case of the State Tax of Foreign-held Bonds" *15 Wall., 300*, it is decided, as stated in the syllabus, that

"The tax laws of a State can have no extra-territorial operation; nor can any law of a State inconsistent with the terms of a contract made with, or payable to, parties out of the State, have any effect upon the contract whilst it is in the hands of such parties or other non-residents of the State."

In that case the right of Pennsylvania to compel the Philadelphia and Reading Railroad Company, a domestic corporation, to deduct a tax from the interest due to non-resident bond-holders, was denied. Mr. Justice Field, who delivered the opinion of the Court, referring to *Railroad Company* v. *Jackson*, *supra*, said (p. 319):

"It was the fact that the bonds were held by a non-resident which justified the language used, that to permit a deduction of the tax from the interest would be giving effect to the laws of Pennsylvania upon property beyond her jurisdiction, and not the fact assigned by the learned justice. The decision is, nevertheless, authority for the doctrine that property lying beyond the jurisdiction of the State is not a subject upon which her taxing power can be legitimately exercised. Indeed, it would seem that no adjudication should be necessary to establish so obvious a proposition. The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property and business."

And again, on page 325, the learned justice said—

"We are clear that the tax cannot be sustained; that the bonds, being held by non-residents of the State, are only property in their hands, and that they are thus beyond the jurisdiction of the taxing power of the State. Even where the bonds are held by residents of the State the retention by the company of a portion of the stipulated interest can only be sustained as a mode of collecting a tax upon that species of property in the State. When the property is out of the State there can then be no tax upon it for which the interest can be retained. The tax laws of Pennsylvania can

have no extra-territorial operation; nor can any law of that State inconsistent with the terms of a contract, made with or payable to parties out of the State, have any effect upon the contract whilst it is in the hands of such parties or other non-residents. The extra-territorial invalidity of State laws discharging a debtor from his contracts with citizens of other States, even though made and payable in the State after the passage of such laws, has been judicially determined by this Court. A like invalidity must on similar grounds, attend State legislation which seeks to change the obligation of such contracts in any particlar, and on stronger grounds where the contracts are made and payable out of the State."

In *St. Louis* v. *The Ferry Company, 11 Wall., 423,* the city of St. Louis attempted to tax the boats of a company incorporated by the State of Illinois, as property within the city of St. Louis. The Court found that the *situs* of the property was in Illinois and that the boats could not legally be considered as property in the city of St. Louis or State of Missouri, although that city was one of the termini of their voyage. It therefore denied the right to tax them in Missouri, Mr. Justice Swayne, who delivered the opinion of the Court, saying:

"It has been said that the power of taxation for the purposes of the Commonwealth is a part of all governmental sovereignty, and is inseparable from it. It is for the Legislature to decide what persons and property shall be reached by the exercise of this function and in what proportions and by what processes and instrumentalities taxes shall be asssessed and collected. The authority extends over all persons and property within the sphere of its territorial jurisdiction. When called into activity there can be no limit to the degree of its exercise except what is found in the wisdom of the law-making power and the operation of those conservative principles which lie at the foudation of all free government. "When there is jurisdiction neither as to persons nor property, the imposition of a tax would be *ultra vires* and void. If the Legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its

own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action."

In the case of "*The Delaware Railroad Tax*," *18 Wall., 206*, Mr. Justice Field, delivering the opinion of the Court, said (p. 229)—

"We proceed, therefore, to the second objection to the act, that it imposes taxes upon property beyond the jurisdiction of the State. If such be the fact, the tax to that extent is invalid, for the power of taxation of every State is necessarily confined to subjects within its jurisdiction."

The right of a State to compel natural persons or corporations to act as involuntary assessors and collectors of State taxes is certainly not greater than her power to impose taxation, and if, as so frequently decided by this Court, the power to tax is limited to her territorial jurisdiction, it follows that her powers, rights and remedies for the assessment and collection of taxes cannot be more extensive.

In *Ogden* v. *Saunders*, *12 Wheat., 213*, this Court decided that the bankrupt or insolvent laws of any State could not be made or held to act upon the rights of citizens of other States. It was there ruled that the power to pass bankrupt laws is not exclusive in Congress, and that the fair and ordinary exercise of that power by the States does not necessarily involve a violation of the obligation of contracts. But Mr. Justice Johnson, who delivered the opinion of the majority of the Court, laid down as the proposition controlling that case, that (p. 369)—

"When, in the exercise of that power, the States pass beyond their own limits, and the rights of their own citizens, and act upon the rights of citizens of other States there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other States, and with the Constitution of the United States."

The correctness of this proposition was assented to by Mr. Chief Justice Marshall, Mr. Justice Duvall and Mr. Justice Story, and in *Baldwin* v. *Hale, 1 Wall., 223*, is again enforced by the unanimous Court, Mr. Justice Clifford, who delivered the opinion, saying (p. 234)—

"Insolvent laws of one State cannot discharge the contracts of citizens of other States, because they have no extra-territorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other State voluntarily becomes a party to the proceeding, has no jurisdiction in the case."

The treasurer of this corporation is a resident of the State of New York. All the principal officers of the company are residents of that State. Pennsylvania, therefore, has no jurisdiction over them, nor any of them. Neither has it jurisdiction over the artificial person, the corporation, upon whom it seeks to fasten the final responsibility of the collection of the taxes in question. The domicile of a corporation is in the State of its creation and it cannot migrate therefrom. *Augusta Bank* v. *Earle, 13 Peters, 519.*

The State of Pennsylvania has no jurisdiction over the charter contract between the State of New York and the railroad company, in pursuance of which the bonds and mortgages securing the same were issued, neither has it jurisdiction over the contract contained in the bonds themselves, issued sold and delivered in the State of New York, to residents of that State, and which, by the terms thereof, are to be performed in that State. Neither has Pennsylvania jurisdiction over the fund from which she commands that her taxes shall be deducted.

But the learned justice who delivered the opinion of the Supreme Court of Pennsylvania, while conceding that "the general statement that foreign corporations are ordinarily beyond the reach of our processes of taxation, is undoubtedly correct," contends that foreign corporations can do business in Pennsylvania only upon such conditions as the State

may think proper to impose. He says—"That a corporation of one State cannot do business in another State without the latter's consent, express or implied, and that consent may be accompanied by such conditions as the latter may think proper to impose." These conditions, he says, "will be valid and effectual, provided they are not repugnant to the constitution or laws of the United States, inconsistent with the jurisdictional authority of the State, or in conflict with the rule which forbids condemnation without opportunity for defense;" and he adds that "it was competent for the Legislature of Pennsylvania to impose as a condition upon foreign corporations doing business in this State that they shall assess and collect tax upon that portion of their loans in the hands of individuals resident within this State, and otherwise comply with the provisions of the act of 1885. The act imposes no tax upon the company; it simply defines a duty to be performed and fixes a penalty for disregard of that duty. The Legislature having so provided, compliance with the act may, in some sense, be said to form one of the conditions upon which corporations may do business within the State, and the corporation continuing its business subsequently would be taken to have assented thereto." But the conditions contained in the act of 1885, if they be conditions, did *not* accompany the consent given to this company in 1841 and 1846. They *are* "inconsistent with the jurisdictional power of the State," and they are sought to be imposed forty years after the consent of the State was given, accepted and acted upon. This leads to the discussion of the proposition involved in the fourth assignment of errors, that—

The act of June 30, 1885, impairs the obligation of the contract contained in the legislation of the State of Pennsylvania, in pursuance of which the railroad of said company was constructed through a portion of said State, and is therefore void because in conflict with section 10 of Article I. of the Constitution of the United States.

If it be conceded that when this company sought permission to construct and operate a portion of its line within the limits of the State of Pennsylvania, that State had the right to impose such conditions as she saw fit it must, on the other hand, be also conceded that she did at that time forty years ago, impose such conditions; that the said conditions then imposed, although exceedingly onerous, have been fully complied with by the company, and that those sought to be imposed by the act of 1885, if not inconsistent, with are at least additional to, the expressed conditions under which the company entered the State. They are also, it is contended, "inconsistent with the jurisdictional authority of the State." It was originally contemplated that the road should touch only the county of Susquehanna, as provided in the act of February 16, 1841, (see page 15 hereof). It was subsequently found desirable that it should enter the county of Pike, whereupon the act of March 26, 1846, was passed (see page 19 hereof). It will be found that these two acts prescribe very clearly all the terms and conditions which the State thought necessary or proper to impose upon this foreign corporation as the price of its consent. Among the particularly onerous conditions may be mentioned that contained in section 11 of the act of 1841, making the company liable absolutely for all damages sustained by fires occasioned by sparks falling from locomotive engines, a liability which the laws of the State do not impose upon her own corporations.

Also the provision contained in section 3, that the company "shall so regulate their tolls that the charge on anthracite and bituminous coal shall not exceed one and one-half cents per ton per mile," although at that time domestic railroads were authorized to and did, and many of them still do, charge double that rate.

Section 5 made it the duty of the company to file in the office of the Auditor General of Pennsylvania a statement showing a full and correct account of the costs of that por-

tion of the road within the State, and section 6 provided that the stock of the company to an amount equal to the cost thus shown should be subject to taxation in the same manner and at the same rate as other similar property is or may be subject.

Section 5 also provided that for the privileges granted the company should pay into the State Treasury annually, in the month of January, the sum of $10,000—a most burdensome condition, this annuity alone being a larger contribution than the State has ever enforced in taxes or otherwise from any of her own corporations owning no more railroad within her borders.

The acts of 1841 and 1846 will be found thorough and complete in all details. They compel the company to make detailed statements of its affairs to the Legislature; require it to allow connections by other roads, and provide for actions by as well as against the company.

The charter of the Pennsylvania Railroad Company, which appears on page 312 of the same volume of the laws of Pennsylvania, having been chartered in the same year by special act, approved April 13, 1846, contains no provision making it liable for damages by fire; no provision requiring it to pay $10,000 per annum, or any other sum for the privileges conferred, but authorizes it to charge three cents per mile for each ton of 2,000 pounds of freight where the cars used for such transportation are owned or furnished by others, the motive power only being furnished by the Pennsylvania Company; and for the transportation of freight by its own motive power, in its own, cars "such rates of toll or other compensation . . . . . as to the president and directors shall seem reasonable." (See section 21, P. L. 1846, p. 323.) The general railroad law of February 19, 1849 (P. L. 79), applicable to all railroads chartered after that date in Pennsylvania, authorizes them to charge three cents per ton per mile for all freight.

The acts of 1841 and 1846, it is earnestly contended, constitute a contract between the State of Pennsylvania and the

railroad company. In pursuance of that contract the company expended more than two millions of dollars in the construction of that portion of its road in that State. It has paid into the Treasury of that State, under the 5th section of the act of 1846, $460,000, being forty-six consecutive payments of the annuity of $10,000, in addition to the same taxes upon its property and business within the State as have been imposed upon other like property and business. The proposition involved in the decision of the Supreme Court of Pennsylvania is, that the State has now the right to vary the terms upon which her assent was granted, and to impose additional conditions not prescribed nor contemplated in the acts of 1841 and 1846. This proposition would seem to be in direct conflict with the decision of the same Court as to her own corporations. In *Commonwealth* v. *Erie & Western Transportation Company, 107 Pa., 112,* the transportation company, chartered in 1865 with power to increase its capital stock from time to time, made an increase in 1881, and the Commonwealth endeavored to recover a bonus upon such increase under an act passed in 1874. But the Court held, as stated in the syllabus, that—

"A corporation chartered in 1865, by a special act of the Legislature, which conferred the unconditional 'privilege of increasing its capital stock from time to time,' cannot be required, upon an increase of its capital stock, to pay the bonus which, by the general act of April 18, 1874, is required to be paid by all corporations upon an increase of capital stock under that act. To require such payment would impair the obligation of the contract contained in the charter, within the prohibition of Article I. section 10 of the Constitution of the United States. There is an essential distinction between a tax and a bonus. The legislative power of taxation is limited only by its own sovereignty; a bonus implies a consideration for something conferred, and where the corporation receives nothing beyond what it possessed by its charter, the Legislature cannot exact additional consideration."

If a State cannot impose upon a domestic corporation an additional bonus or consideration for a privilege previously granted, upon what principle can she require from a foreign corporation a consideration neither expressed or implied in the original contract? But the learned Justice of the Supreme Court of Pennsylvania says: "Apart from these statutes the company had the right, under the comity of the State, to sue within the State of Pennsylvania." If it had, so had every other foreign corporation. If that right gives to Pennsylvania any extra-territorial authority over this corporation, it gives the same authority over every corporation of the United States. The argument proves too much. The right has never been exercised nor claimed by the Erie Company, except in connection with and in pursuance of, the authority conferred by the acts of 1841 and 1846. The additional condition sought to be imposed upon the doing of business by the company in Pennsylvania is a very burdensome one. As contended by the Commonwealth at the outset, it amounted to more than $234,000 per annum. As decided by the State courts upon the facts in these three cases, involving the years 1886, 1887 and 1888, it amounts to something over $2,500 per annum. By the Pennsylvania statute of 1891, the rate has been increased from three mills to four mills, and in the cases heard in the trial court for 1889 and 1890 it has appeared that additional amounts of bonds have come into the ownership of residents of Pennsylvania, so that it is safe to say that if this judgment is affirmed the company will hereafter be compelled to pay not less than $10,000 per annum for the failure or inability of its treasurer to comply with the requirements of the act of 1885. That compliance is impossible, and that the burden must fall upon the company clearly appears from the fourth finding of facts of the trial court (Ante, p. 27; Record, p. 33-34), which finding is abundantly sustained by the testimony of the treasurer and secretary of the company (Record, p. 17, *et seq.*). Even as to the

bonds which, in its fifth and sixth findings of facts, the Court held to have been owned in 1888 in Pennsylvania they were not definitely shown to have been so held at any time within the year, and there was in fact, no evidence whatever that any of them were so held at any interest-paying period, and it is not found by the Court that they were so held at any such period.

The holders of bonds in this company are entitled to one vote, either in person or by proxy, at the election of officers, for each $100 of bonds. The name of a person presenting either a bond or a proxy is registered. Most of the bonds are voted by proxy, and the name only of the person holding the proxy appears upon the register. A certain number of the persons whose names thus appeared as having voted in 1888, were found to be residents of Pennsylvania, and the bonds were therefore assumed by the Court to have been owned in Pennsylvania, which may not have been the case even at the time of the election. The mere fact that they were voted by a Pennsylvanian at the annual election would afford no evidence that they were owned by residents of Pennsylvania at any interest-paying period. There was no evidence that any resident of Pennsylvania presented a coupon for payment in 1888, and the treasurer of the company testified that he could not say that any coupons were so presented for payment (Record, p. 28). All of the seventy-eight millions of bonds are coupon bonds. They are subject to registration in the name of the owner. But in 1888 only $11,124,300 were so registered. Even this registry affords no positive evidence of the ownership of the bond at any particular date, as transfers of record are frequently postponed for a long time after actual sale and change of ownership, and in any event, the name only, and not the residence of the owner is registered, and a long and tedious examination would be required to ascertain the residence of each owner whose name thus appeared upon the register.

These seventy-eight millions of dollars of coupon bonds change hands daily in the public markets of this and other countries. A bond may be held in Europe to-day, New York to-morrow, and in Pennsylvania the next day. The total indebtedness of the company is represented by more than one hundred and sixty thousand separate bonds, not all of them being for the same amount, and to trace their ownership upon a given day and to know from which ones, if any, a Pennsylvania State tax may properly be deducted, is absolutely impossible. If the company is to be held responsible for the performance of that duty as an additional consideration for the privileges conferred by the acts of 1841 and 1846, then it follows that it must pay out of its own treasury a tax which ought to be paid, if at all, by such of its creditors as may chance to reside within that State. The collection of the tax by the company from those creditors is impossible. If it be conceded that the company accepted the legislation of 1841 and 1846 upon the necessarily implied condition that its property and business within the State should be subject to such taxation and general regulation as might be exercised by the State in regard to other similar property and business within her borders, it cannot for one moment be conceded, but, on the contrary, is most positively denied that there was any condition, either expressed or implied, that the officers, property, business or affairs of the company not within the State of Pennsylvania should be in any way subjected to her power, authority or regulation, and there certainly was no condition, expressed or implied, that either the company itself, or its officers, should act either in the State of New York, or elsewhere, as the agent of Pennsylvania for the collection of taxes due upon property not belonging to the company but to individual citizens residing in Pennsylvania, not responsible to, nor having any connection with, nor relation to the company, except as its creditors.

The act of 1885 impairs the obligation of the contract

contained in the statutes of 1841 and 1846, in that it attempts to impose additional considerations for doing within the State the business permitted by these statutes, upon the conditions therein expressed or necessarily implied.

Furthermore, as set forth in the seventh assignment of error—

The act of June 30, 1885, is unconstitutional and void because in conflict with that provision of the Constitution of the United States which confers upon Congress the power "to regulate commerce with foreign nations and among the several States and with the Indian tribes."

In affirming the company's third exception (Record pp. 40–45) the Court, although considering it immaterial, nevertheless finds the fact that "so far as the State of Pennsylvania is concerned, the business of the company consists chiefly in the transportation of freight and passengers from or to, or from and to, other States into, out of, or through, the State of Pennsylvania." There is no evidence nor finding that the company is engaged in any business in Pennsylvania other than the operation of its railroad, and if, as argued by the Supreme Court of Pennsylvania, the duty sought to be imposed upon the company by the act of 1885, may be so imposed as the condition upon which it may continue to do business in the State, then it is a condition upon the transportation by it of freight and passengers inter-State, a condition at variance with the exclusive power of regulation conferred by the Constitution upon Congress. *Norfolk & Western R. R. Co.* v. *Pennsylvania, 136 U. S., 114; McCall* vs. *California, ibid. 104; Leloup* v. *Port of Mobile, 127 U. S., 640; Pickard* v. *Pullman's Southern Car Co., 117 U. S., 34; Penna.* v. *Gloucester Ferry Co., 114 U. S., 196; Phila. & Southern Steam Ship Co.* v. *Penna., 122 U. S., 326; Fargo* v. *Michigan, 121 U. S., 230; W. U. Tel. Co.* v. *Penna., 128 U. S., 39; Case of the State Freight Tax 15 Wall., 232; Hall* v. *DeCuir 95 U. S., 485; Pacific Express* v. *Seibert 142 U. S., 339; Wabash Railway Co.* v. *Illinois 118 U. S., 557; Coe* v. *Errol 116 U. S., 517.*

The third and fifth assignments of error, which may conveniently be discussed together, involve the further objection that—

The act of June 30, 1885, is in conflict with section 10 of Article I. of the Constitution of the United States because, if valid, it would impair the charter contract between the company and the State of New York, in pursuance of which its bonds and mortgages were issued, and also the contract between the company and the holders of its bonds.

It was understood and agreed upon the trial of these cases in the trial court, that either party desiring to do so might refer to the acts of assembly of the State of New York, constituting the charter of this company. They contain, however, no special provision requiring particular notice. They simply authorize the company to borrow money, to issue its bonds for the amount thereof upon such terms as may be agreed upon between the parties, provided the interest paid shall not exceed seven per cent. per annum, and that the bonds may be secured by mortgage upon the property and franchises of the corporation. This is their general tenor, except as to the first mortgage bonds, which were originally issued direct to the State of New York, in payment for moneys previously advanced by the State, in pursuance of the statute of May 14, 1845, which provides that the bonds themselves, when issued according to the terms thereof and registered in the office of the Secretary of State, "shall thereupon become and be, to all intents and purposes, mortgages to the people of this State upon the entire property of said company, real, personal and mixed, together with all its franchises and immunities for securing the payment of monies purporting to be payable by said bonds; and on the said bonds being delivered to the comptroller they shall be taken and received in payment and satisfaction of all liability of the said company to this State, existing at the passing of this act; and the registry of such bonds as herein provided shall be notice of the lien created thereby to all persons whomsoever."

In that case no mortgage was issued by the company. The form of the bonds originally issued for twenty years, and subsequently extended, is shown on page 56 hereof.

The first consolidated mortgage bonds which are fair samples of all the others, are in the form shown on page 57 hereof. All the bonds and mortgages are included at length in the record in No. 75. But none of them contain any provisions material to this discussion not embraced in the samples here printed. Neither the legislation of the State of New York constituting the charter of the company, the bonds, nor the mortgages, contain any reference whatever to taxation of any kind, nor to the assessment and collection of any taxes, nor to the deduction upon any account whatsover of any portion of the interest provided to be paid. But upon the subjects of taxation, assessment and collection of taxes of any kind the said statutes, mortgages and bonds are entirely silent. Substantially the charter contract between the company and the State of New York is that the company may issue its bonds and contract therein with its creditors to pay the same, with interest thereon, payable at a certain rate therein specified, upon certain days therein fixed. It is quite true that no contract which could be made between the State of New York and its own corporations could relieve from taxation bonds issued in pursuance of said contract, when held and owned by residents of Pennsylvania. Undoubtedly bonds issued by the State of New York herself would, if owned in Pennsylvania, be subject to Pennsylvania taxation. The question here, however, is not as to the right of Pennsylvania to tax such bonds as may be held and owned within her borders, but as to her right to reach over into the State of New York and substantially to inject into the charter originally granted by that State a provision that upon the bonds issued in pursuance thereof the interest shall not be paid in full in accordance with the terms of the contract, but that this New York corporation or its treasurer, a resident of that State, shall, before paying the interest, ascertain and determine the resi-

dence of the owners of its bonds, and if any of them are found to be owned in Pennsylvania, deduct from that interest a certain specified sum for the use of the Commonwealth. This, it is respectfully contended, impairs the obligation of the charter contract. It imposes upon the issuance of bonds in pursuance thereof, conditions not expressed in the charter and which cannot be construed into it upon any principle of necessary implication. It can hardly be pretended that the charter was accepted by the company from the State of New York upon the implied condition that as to bonds issued in pursuance of its authority the company would assume the duties and responsibilities of collecting taxes for the State of Pennsylvania. If one State can enforce such conditions, so can every other, and charter privileges granted by the State of New York would have very little value if each other State in the Union in which the New York corporation may chance to own property or transact business may enforce its own conditions upon which the company may borrow money, issue bonds and mortgages and pay the same or the interest thereon in the city of New York.

As between the company and the holder of one of its bonds, the terms of the contract require it to pay to him, either in London or in New York, at his option, a certain specified amount of interest upon a particular day. Suppose a bondholder, known to be a resident of Pennsylvania, to present his coupon upon that day for payment; the treasurer of the company tenders him the amount, less three dollars Pennsylvania State tax. He refuses to receive the reduced amount, protests the coupon before a notary public in New York, and brings suit against the company in a New York court for the full amount thereof. Could the company in defense successfully maintain the position that the contract, made in the State of New York, under express authority of her laws, performable by its terms in that State, sued upon in that State and in the courts of that State, was subject to the condition, not expressed in the bond, that the

amount of interest to be paid might be varied by a law of the State of Pennsylvania?

Undoubtedly the obligation of a contract involves something more than is to be found in the mere words of the instrument itself. As stated by Mr. Justice Swayne, who delivered the opinion of the court in *Von Hoffman* v. *City of Quincy, 4 Wall., 530–550* :

"It is also settled that the laws which subsist *at the time and place of the making of a contract, and where it is to be performed,* enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement."

But there is no decision nor ruling, nor even *dictum,* by any court or judge of any court, to the effect that the laws, whether past, present or prospective, of any State other than that wherein the contract was made, is to be performed and is enforceable, enter into or form any part of either the contract or the obligation thereof. It seems too plain to admit of argument that the laws of Pennsylvania cannot constitutionally be of any effect to vary in any way the obligation which the terms of the contract impose upon the company to pay upon a certain day a specified amount of interest. The fact that the bondholder may be a resident of Pennsylvania does not affect the question. The contract is still one which was made in New York. It is performable there and can be enforced there, and only there. That the bond is taxable as property in Pennsylvania in the hands of the resident holder is not denied. But that is a matter between the State and her citizen who owns the bond. She must collect the tax from him by processes exercisable within her own territorial jurisdiction and authority. She cannot enforce either assessment or collection by any law intended to operate upon the terms or obligation of the contract itself, where that contract is made, performable and enforceable only in another State.

The effect of the act of 1885 is to compel the company to violate its contracts, not only with residents of Pennsylvania, but also with non-residents. In the "*Case of the State Tax on Foreign-held Bonds*," *15 Wall., 300*, this Court squarely decided that the Pennsylvania statute of 1868, requiring a deduction to be made from the interest paid on foreign-held bonds, did impair the obligation of the contract between the company and its bondholder, and Mr. Justice Field, delivering the opinion of the majority of the Court, said (p. 320):

"It is a law which interferes between the company and the bondholder, and under the pretense of levying a tax commands the company to withhold a portion of the stipulated interest and pay it over to the State. It is a law which thus impairs the obligation of the contract between the parties. The obligation of a contract depends upon its terms and the means which the law in existence at the time affords for its enforcement. A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation, for, as stated on another occasion, such a law relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement. The act of Pennsylvania of May 1, 1868, falls within this description. It directs the treasurer of every incorporated company to retain from the interest stipulated to its bondholders five per cent. upon every dollar and pay it into the Treasury of the Commonwealth. It thus sanctions and commands a disregard of the express provisions of the contracts between the company and its creditors. It is only one of many cases where, under the name of taxation, an oppressive exaction is made without constitutional warrant, amounting to little less than an arbitrary seizure of private property."

In the fourth finding of facts the trial court found that—

"It is practically impossible for the treasurer or other officers of defendant, at the time the coupons are presented, to ascertain the residence of the owner of the bonds from which they have been separated, because of the large number of coupons presented at the dates when they become due, the

whole number of coupons due semi-annually amounting to more than one hundred and fifty thousand, and as many as twenty thousand being presented in a single day; and for the further reason, that the bankers and their messengers, when they present the coupons, in very many instances do not know who are the owners of the bonds from which they have been detached, and could not be compelled to disclose if they did know, as the coupons are payable to bearer; and a refusal of the treasurer of the company to pay the coupons on presentation, except upon condition of the ownership being disclosed, would subject it to the risk and expense and loss of credit of having the coupons protested for non-payment." (Record, pp. 33–34.)

In its seventh finding of facts in No. 75, the Court found the same fact in this language:

"It was impossible for the officers of the company upon the payment of interest, to determine what bonds, if any, were owned by residents of Pennsylvania. They could only have done so by suspending the payment of interest upon all bonds until the ownership of each could have been ascertained, which ascertainment would have required an investigation necessarily consumidg several weeks or months of time."

These findings are fully justified by the evidence in each case. Thus the treasurer of the company testifies in this case (Record, p. 29), that to make any sort of investigation as to the ownership of the bonds at the interest-paying period would "block the payment of the interest of the entire loan." In No. 75 the Secretary of the company testified that:

"It is impossible upon the presentation of coupons, for any officer of this company to know the residence of the holders of the bonds to which they were originally attached, and in most cases it is impossible to know who own the coupons themselves. To ascertain the ownership of the bonds and coupons, or either, at any given date would require months of patient investigation, and would necessarily entail such expenses and results upon the company that to avoid them it would be cheaper and better for the company itself to pay

the taxes upon any bonds which may be owned by citizens of Pennsylvania, rather than to attempt to withhold the payment of the coupons until such investigation could be made."

Indeed, it would hardly require any testimony to convince either court or jury of the impossibility of determining in one day the residence of the owners of the bonds from which twenty thousand coupons presented on that day had been detatched, the coupons coming in from all quarters of the globe some of them having passed through as many as a dozen banks before reaching the company for payment, and if, in order to ascertain what bonds are owned in Pennsylvania, it is necessary to stop payment upon all, including those owned by non-residents, it is manifest that any law requiring such suspension violates the obligation of the contract at least as to the bonds owned by non-residents. Such is plainly the effect of the Pennsylvania statute in question.

The notorious fact judicially found by the trial court in its fourth finding (Ante p. 27, Record 33) that the coupons when presented for payment are seldom owned by the holders of the bonds to which they were originally attached, involves the discussion of a still further particular in which the obligation of contracts is impaired as suggested in the eighth assignment of error.

The requirement that the company shall deduct from the amount due upon a coupon owned or presented by one person the tax due upon the bond from which said coupon has been detached, said bond belonging to a different person, impairs the obligation between the company and the owner of the coupon.

That a coupon detached from the bond constitutes a separate contract was clearly decided in *Clark* v. *Iowa City, 20 Wall., 583,* in which case Mr. Justice Field, who delivered the opinion, clearly defined the nature and character of coupons thus: (p. 58)

"Most of the bonds of municipal bodies and private corporations in this country are issued in order to raise funds for works of large extent and cost, and their payment is, therefore, made at distant periods, not unfrequently beyond a quarter of a century. Coupons for the different installments of interest are usually attached to these bonds, in the expectation that they will be paid as they mature, however distant the period fixed for the payment of the principal. These coupons, when severed from the bonds, are negotiable and pass by delivery. They then cease to be incidents of the bonds, and become in fact independent claims; they do not lose their validity, if for any cause the bonds are cancelled or paid before maturity; nor their negotiable character; nor their ability to support separate actions; and the amount for which they are issued draws interest from its maturity. They, then, possess the essential attributes of commercial paper, as has been held by this Court in repeated instances. Every consideration, therefore, which gives efficacy to the statute of limitations when applied to actions on the bonds after their maturity, equally requires that similar limitations should be applied to actions upon the coupons after their maturity.

"Coupons, when severed from the bonds to which they were originally attached, are in legal effect equivalent to separate bonds for the different installments of interest. The like action may be brought upon each of them, when they respectively become due, as upon the bond itself when the principal matures."

It has also been decided by the Supreme Court of Pennsylvania that—

"The coupons of railroad bonds are negotiable instruments, and may be sued on by the holder separate from the bonds, and interest from the date of demand and refusal of payment may be recovered." *County of Beaver* v. *Armstrong 44 Pa., 63.*

The tax in controversy is imposed upon the bond. It being owned by A, can any law authorize the tax to be deducted from the amount due upon the coupon owned by B? Doubtless the coupon, when thus detached, is property which might be itself subjected to taxation, but to require it

to bear the burden of the tax imposed by law upon the bond is clearly to take the property of one man to pay a tax assessed upon the property of another. This precise question seems to have been decided by this Court in *Hartman* v. *Greenhow, 102 U. S., 672.* Mr. Justice Field, who delivered the opinion, said (p. 674):

"The principal question for determination, as thus seen, is the validity of the statute of the State requiring the tax levied upon its bonds to be deducted from the coupons for interest, originally attached to them, when the coupons are presented for payment, so far as it applies to coupons separated from the bonds and held by different owners."

Referring to *Clark* v. *Iowa City, supra,* the learned Justice further said (p. 684):

"Here, also, the coupons held by the petitioner were distinct contracts imposing separate obligations upon the State. He was not the owner of the bonds to which they had been originally attached. In his hands they were as free and discharged from all liability on those bonds as though they had never been connected with them. And surely it is not necessary to argue that an act which requires the holder of one contract to pay the taxes levied upon another contract held by a stranger cannot be sustained. Such an act is not a legitimate exercise of the taxing power; it undertakes to impose upon one the burden which should fall, if at all, upon another."

The first assignment of error is not pressed. It is conceded that the constitutional provision therein referred to does not apply.

The second assignment is probably covered by the decisions of this Court in *Bell's Gap R. R. Co.* v. *Pennsylvania,* 134, *U. S.,* 232, and *Jennings* v. *Coal Ridge Improvement and Coal Company,* 147, *U. S.,* 147, which seem to hold that when the bond is taxable, it is competent for the State to

impose the tax upon the nominal or par, regardless of the actual, value thereof, and regardless also of the fact that similar bonds, when issued by individuals or by foreign corporations not doing business in the State, are assessed and taxed upon their actual, and not upon their nominal or par value.

Whatever may have been decided, or whatever may be said, as to the right of a State to require her own corporations to deduct a State tax when paying interest within the State upon bonds issued to and owned by her own citizens, and involving contracts made in pursuance of her authority, to be performed within her jurisdiction and enforceable in her courts, that is not the question here. It may be that under such circumstances a domestic corporation may safely assume that the bond is owned by a resident and withhold the interest or the portion thereof which is due as tax, until the contrary is shown.* It may be that the fund from which the interest is to be paid, being within her borders, the State may lay hold of or enforce a lien upon it so as to insure the payment of the taxes due her. But here the conditions are precisely the reverse. The fund is not in the State. The bonds having been issued by a foreign corporation to non-residents, there can be no presumption that any of them are owned in Pennsylvania. The contracts were made in another State in pursuance of authority contained in a charter granted by that State, and are performable and enforceable in that State.

It is worthy of note also that the fourth section of the act of 1885 seems to contemplate some of the difficulties here pointed out. The duty of assessment and collection of the tax is in terms imposed upon the treasurer of the corporation only "upon the payment of any interest on any scrip,

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* The contrary is ruled in *Hinchman* vs. *Phila. & Reading R. R. Co.*, *5 C. C. R.*, *632*, decided by Mr. Justice Mitchell, now upon the Supreme Bench. See decision commented upon by Judge Simonton in this Record, p. 36.

bond, or certificate of indebtedess *issued* by said corporation *to residents of this Commonwealth*, and held by them."

The liability of the corporation itself for the tax is in the nature of a penalty for the failure of its officers to perform this duty. Being penal in its nature, the act should be strictly construed and ought not, therefore, to be held to include any of the bonds of this company, as, while some of them may now be held by residents of Pennsylvania, none of them were "issued by said corporation" to such residents, but all of them were issued by the corporation to non-residents of that State, and they were all issued prior to 1885. See fourth finding of fact (Ante 27, Record p. 33.)

In its second finding of fact in No. 79, the Court says, "All of the above mentioned indebtedness was contracted and the mortgages, and the bonds included in them were issued and sold in the City and State of New York to non-residents of Pennsylvania." There is a similar finding in No. 75. These findings are justified by the evidence. (See record p. 19–20 in this case.)

The laws of Pennsylvania cannot constitutionally operate upon nor affect the contracts involved, nor can her processes for the assessment and collection of taxes be enforced outside the limits of her territorial jurisdiction. The judgment of her Supreme Court should therefore, it is respectfully submitted, be reversed.

M. E. OLMSTED,
Attorney for Plaintiff in Error.

[Copied from Record in No. 75.]

FIRST MORTGAGE BOND.

No. ——— $1,000.

New York and Erie Railroad Company.

Know all men by these presents, that the New York and Erie Railroad Company acknowledge themselves indebted to the people of the State of New York in the sum of one thousand dollars, lawful money of the United States, which sum they promise to pay in the city of New York to the said people of the State of New York or their assigns, in twenty years from the date of this bond, with interest at the rate of seven per centum per annum from the date of the assignment of the same by the comptroller of the State, payable semi-annually, on the first days of May and November in each year, on the presentation and delivery of the annexed dividend warrants.

This bond is issued under the provisions of an act of the Legislature of the State of New York, passed May 14th, 1845, entitled "An act in relation to the construction of the New York and Erie Railroad, which provides that all bonds issued in pursuance thereof of the amount authorized, being limited to $3,000,000, shall be numbered and registered in the office of Secretary of State, and shall thereupon become and be, to all intents and purposes, mortgages to the people of this State upon the entire property of said company, real, personal, and mixed, together with all its franchises, and immunities, for securing the moneys purporting to be payable by said bonds; and on the said bonds being delivered to the comptroller, they shall be taken and received in payment and satisfaction of all liability of the said company to this State, existing at the passing of this act; and the registry of such bonds as herein provided shall be notice of the lien created thereby to all persons whomsoever."

In witness whereof the said company have caused this bond to be attested in their behalf by their president and secretary, and the common seal affixed in their office in the city of New York this first day of July in the year of our Lord one thousand eight hundred and forty-seven.

President.

Secretary.

Registered in the office of the Secretary of State.

Secretary State of New York.

FORM OF COUPON.

Warrant for eleven $\frac{67}{100}$ dollars.

Being two months interest on Bond No. ——— of the New York and Erie Railroad Company, issued under the act of the Legislature of New York of May 14th, 1845, payable on the first day of July, 1867.

$11.$\frac{67}{100}$.

Sec'y N. Y. & E. R. R. Co.

[Copied from Record in No. 75.]

FIRST CONSOLIDATED MORTGAGE COUPON BOND.

1000. £200.

The New York, Lake Erie and Western Railroad Company.

Know all men by these prosents, that the New York, Lake Erie and Western Railroad Company acknowledges itself indebted unto Edwin D. Morgan, or to the registered holder, or if unregistered, the bearer hereof, in the sum of one thousand dollars in gold coin of the United States of America, which the said company agrees to pay in like gold coin, or in sterling money at the rate of four shillings to the dollar, to the registered holder, or if unregistered, to the bearer hereof, on the first day of September, in the year of our Lord, 1920, at the office of the said company in the city of New York, or at the agency of the said company in the city of London, and also to pay until repayment, interest thereon at the rate of seven per cent. per annum, payable half yearly, in like coin or sterling money, at the rate aforesaid, on the first day of March and on the first day of September in each year, at the office of the company in the city of New York, or at the option of the holder, at the agency of the said company in the city of London, England, on the presentation and surrender of the annexed coupons as they severally become due. And it is hereby agreed that during the period covered by the coupons attached hereto, or by any coupons issued to replace or follow the same, each installment of interest shall be payableto the bearer of the coupon relating thereto, on his surrendering the same. And it is hereby further agreed that the holder of the bond, may at any time, on payment of the fee established therefor, have the same registered, under such regulations as the company may establish, in his name or in the name of any nominee or nominees, on the books of the company at New York or such other place or places of registration as the company may designate, and such registration may from time to time, on complying with such regulations, be extinguished and cancelled, and again renewed, but after such registration, and while the same remains unextinguished and uncancelled, this bond can only be transferred by the registered holder, his duly authorized agent or

lawful successor in title, by a proper entry of transfer on the books of the company, and an endorsement of such transfer upon the bond. Due extinguishment and cancellation of registration stamped or endorsed upon the bond by the company, will restore the negotiability thereof. This bond is one of a series of bonds amounting in the aggregate to no more than $3,718,100, issued in such denominations as aee necessary or convenient to fund and provide for the defrred and funded interest on bonds of the Erie Railway Company, secured by the First Consolidated Mortgage to the Farmer's Loan and Trust Company of the city of New York, dated the first day of September, 1870, in pursuance of the plan and agreement of re-organization of the said Erie Railway Company, set forth in the certificate of incorporation of the said New York, Lake Erie and Western Railroad Company, on file in the office of the Secretary of State of the State of New York, to which reference is had. Each bond of this series is of identical tenor with every other, except as to amount, and is equally secured by the lien of the said First Consolidated Mortgage, the interest coupons representing such funded interest being held by the Farmer's Loan and Trust Company in trust for that purpose. This bond shall not become obligatory until authenticated by a certificate hereon, signed by the said Farmer's Loan and Trust Company of the city of New York, trustees under the said First Consolidated Mortgage, and countersigned by the secretary of the voting trustees mentioned in the said certificate of incorporation.

In testimony whereof, the said New York, Lake Erie and Western Railroad Company has caused its corporate seal to be hereto affixed, and the same attested with the signature of its president and secretary, and the annexed coupons by the name of said secretary, on the first day of September, in the year of our Lord one thousand eight hundred and seventy-eight.

President.
Secretary.

Countersigned,

Secretary of Voting Trustees.

FORM OF COUPON.

The New York, Lake Erie and Western Railroad Company promises to pay to the bearer hereof, at the office of the comptroller in New York, or at his option, at the agency of

the company in London, on the first day of September, 1920, thirty-five dollars gold, or its equivalent in sterling, at four shillings to the dollar, being interest for the preceding half year, on the Company's First Consolidated Mortgage Coupon Bonds.

No. A. R. MACDONOUGH, *Secretary.*

Endorsed:

No.

New York, Lake Erie and Western Railroad Company.

FIRST CONSOLIDATED MORTGAGE COUPON BOND.

Certificate.

The Farmers' Loan and Trust Company hereby certifies that this bond is one of a series of bonds amounting to not more than $3,718,100 issued and secured as set forth in the said bond.

THE FARMERS' LOAN AND TRUST COMPANY, *Trustee.*

By *President.*

This bond entitles the holder to one vote for each one hundred dollars of its amount, exclusive of interest, at all meetings of stockholders and on all affairs of the New York, Lake Erie and Western Railroad Company, under such regulations as to registry or production, and otherwise as the company may from time to time prescribe.

NOV 9 1893.
JAMES. H. McKENNEY.
CLERK.

153-628

In the Supreme Court of the United States.

Nos. 75, 79 and 591, OCTOBER TERM, 1893.

NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY,

Plaintiff in Error,

vs.

COMMONWEALTH OF PENNSYLVANIA.

Three Writs of Error to the Supreme Court of Pennsylvania, to be tried by agreement upon the record in No. 591.

PAPER BOOK OF DEFENDANT IN ERROR.

JAMES A. STRANAHAN,
Deputy Attorney General.
W. U. HENSEL,
Attorney General.
For the Commonwealth of Pennsylvania. Defendant in Error.

CLARENCE M. BUSCH, STATE PRINTER OF PENNSYLVANIA.

In the Supreme Court of the United States.

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JAMES A. STRANAHAN,
Deputy Attorney General.
W. U. HENSEL,
Attorney General.
For the Commonwealth of Pennsylvania. Defendant in Error.

ARGUMENT OF DEFENDANT IN ERROR.

The New York, Lake Erie and Western Railroad Company is a corporation chartered by the State of New York. It is authorized to do business in Pennsylvania in pursuance of the act of April 22, 1874 (P. L. 108), entitled "An act prohibiting foreign corporations from doing business in Pennsylvania without having known places of business and authorized agents," and it duly certified to the Secretary of the Commonwealth of Pennsylvania, the establishment of an office at Susquehanna, in Susquehanna county, in this State, and the appointment of an agent authorized to transact business therein. It either owns in its own rights, or operates under lease, about one hundred and ninety miles of railroad in the State of Pennsylvania, According to its report in 1888 to the accounting officers of the Commonwealth of Pennsylvania, the nominal value of its scrip, bonds and certificates of indebtedness was $78,573,485.10, upon which a tax of three mills was settled, amouuting to $235,-720.45. From this settlement an appeal was taken by the defendant company, and upon hearing of this appeal in the Court of Common Pleas of Dauphin county, Pennsylvania, it was relieved from the payment of all tax except upon $841,000 of its bonds which were discovered to be owned by individual residents of the State of Pennsylvania and upon which a tax of $2,523 was settled against it. The grounds of appeal from this settlement as set forth by the defendant company, were that its bonds were either held by non-residents of the State of Pennsylvania or they were unable to ascertain that any were held by individual residents of the State; and further, they denied their liability on account of being a foreign corporation and protested against the right of the Commonwealth of Pennsylvania to impose a condition upon it, as a foreign corporation, requiring its treasurer to duduct the interest claimed by the State out of the amount due to its bondholders, although residents of the State of Pennsylvania.

In the hearing before the Court of Common Pleas of Dauphin county, as well as in the Supreme Court, and now before this Honorable Court, the defendant, through its counsel, ingeniously argues the almost impossibility of a foreign corporation ascertaining the residence and ownership of its bonds, as the coupons on same are generally collected through banks, and the ownership of same, or the residence of the owner is not known in this collection. While this may be true, and it undoubtedly is true, in many cases, yet we are relieved of this question in this case, as, from the testimony produced from the officers of the company itself, it was found as a fact by the trial judge in the court below, that $844,000 of the indebtedness of this company were held by individual residents of the State of Pennsylvania, and from this fact no appeal is taken, nor do we understand that it is contracted now in the argument of this case.

That this amount in the hands of the residents of Pennsylvania is taxable is not questioned. The bondholders are not here complaining, neither do they at any time deny the right of the Commonwealth to impose this tax. It is a tax that is imposed upon the bondholders of domestic as well as foreign corporations. There is no discrimination made between them. The method of collecting this tax is the only question in controversy in this case. The defendant company denies the constitutional right of the Commonwealth of Pennsylvania to make its Treasurer a tax collector for the State of Pennsylvania, from the interest on bonds known to be held by residents of the State.

It contends that it is a foreign corporation; that its office is in the State of New York; that its treasurer is a resident of the State of New York, and therefore the Commonwealth of Pennsylvania has no right to impose the duty upon it, a foreign corporation, to collect the tax due from the resident bondholders of the Commonwealth of Pennsylvania.

The Commonwealth of Pennsylvania contends that the fourth section of the Act of June 30, 1885, imposing this condition upon the defendant company, is a reasonable one, and that it applies to foreign corporations doing business in this State as well as to domestic corporations. It further contends that, for the purposes of taxation, the relation of a

foreign corporation doing business in the State of Pennsylvania is that of a quasi domestic corporation and not foreign, and that this company having complied with the Act of Assembly to do business in this State, is subject to the jurisdiction of Pennsylvania for purposes of taxation and judicial proceedings, and is subject to all such duties as may be required to be performed by an individual, not a citizen of Pennsylvania, who is for the time being within her borders.

The report made by the New York, Lake Erie and Western Railroad Company, upon which the settlement is made against it in this case, is made under the authority of section 4 of the Act of Assembly of Pennsylvania of June 30, 1885 (P. L. 193), which reads as follows:

"SECTION 4. That hereafter it shall be the duty of the treasurer of each private corporation, incorporated by or under the laws of this Commonwealth, or the laws of any other State, or of the United States, and doing business in this Commonwealth, upon the payment of any interest on any script, bond or certificate of indebtedness, issued by said corporation to residents of this Commonwealth, and held by them, to assess the tax imposed and provided for State purposes upon the nominal value of each and every said evidence of debt, and to report on oath, annually on the first Monday of November, to the Auditor General, the amount of indebtedness of the corporation owned by residents of this Commonwealth, as nearly as the same can be ascertained; and it shall be his further duty to deduct three mills on every dollar of the interest paid as aforesaid and return the same into the State Treasury within fifteen days after the thirty-first day of December in each year; and his compensation for his services shall be the same that city and borough treasurers receive for similar services; and for every failure to assess and pay said tax and make report as aforesaid, the Auditor General shall add ten per centum as a penalty to the amount of the tax; in payment of said tax by a corporation the bonds, certificates or other evidences of indebtedness issued by it shall be exempt from all other taxation in the hands of the holders of the same."

That the plaintiff in error comes within the terms of this section is not denied. It is admitted that it is doing business in this Commonwealth. There is no question about the amount of bonds taxed being held by residents of the State; and further we do not know of any objections by the owners of the bonds to the payment of the tax. The tax is against

the bondholder, not against the company. The company is asked only to retain it when it pays the interest to the bondholder. It does not allege ignorance of the law nor of the duty it owed to the Commonwealth under the law. It had made no attempt to comply with the requirement of the law, but protested against its enforcement and comes before this honorable court on this ground and this only.

This act of Assembly applies to all corporations, domestic or foreign, and asks them only to retain the tax from such as they can ascertain to be residents of the State. This is surely a reasonable requirement and this corporation should yield obedience to it in common with all others. As applicable to such corporations as are solely domestic, the statute has received judicial construction by the Supreme Court of Pennsylvania and by the Supreme Court of the United States. This principle was decided in the case of Commonwealth of Pennsylvania *v.* Bell's Gap Railroad Company in the Supreme Court of Pennsylvania, and upon appeal taken to the Supreme Court of the United States, in 134 U. S. Reports, Justice Bradley, delivering the opinion of the court, on page 239, says :

"3. *That the corporation is taxed for property it does not own.* This objection is not true in point of fact. The corporation, as the debtor of its bondholders, holding money in its hands for their use, namely, the interest to be paid, is merely required to pay to the Commonwealth out of this fund the proper tax due on the security. The tax is on the bondholder, not on the corporation. This plan is adopted as a matter of convenience, and as a secure method of collecting the tax. That is all. It injures no party. It certainly does not infringe the Constitution of the United States by making one party pay the debts and support the just burdens of another party, as is implied in the objection."

WHAT RELATION DOES THIS COMPANY BEAR TO THE STATE OF PENNSYLVAVNIA FOR PURPOSES OF TAXATION UNDER ITS REVENUE LAWS?

We contend that it is *not*, in all respects, that of a foreign corporation. It has no right to do business in the State without permission. It gets this permission by statutory authority, and therefore it comes in under the laws of the State, is amenable to them, and should consent to their reasonable

requirements. This was a voluntary act upon the part of the company. "Doing business" in the State, by reason of the laws thereof, we contend it is a quasi domestic corporation, and in any event it is subject to the tax laws of the State. This rule is applicable to domestic or foreign corporations. This question is fully discussed in Wood's Railway Law, as will appear by the following citations:

"The domicile of a corporation must necessarily be in the State under whose laws it was created, and this is treated as its location; and in the case of railroad corporations, unlike most business corporations, they are usually created by the laws of the State in which the road is built; and in any event, because they derive all there power to take lands, and all the privileges incident to the operation of the roads, from the laws of such State, and therefore owe allegiance thereto, they are subject to such restrictions and conditions as it may impose. In other words, they are treated for all purposes of jurisdiction, as citizens of the State under whose laws they were organized."

Wood's Railway Law, pp. 27 and 28.

A corporation, like individuals, may have a domicile in one State and a residence in another. Its domicile as we have seen, is in the State creating it, but its residence is in the place where its principal operations are conducted, and may be in a foreign State, as well as in the State to which it owes its corporate life.

Idem, p. 28.

"Corporations are not treated as citizens, according to the general sense in which such term is employed, and it has been held that they are not to be treated as such under that clause in the constitution which declares that 'the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.' They are, however, for most purposes treated as persons, and as such are entitled to the rights and remedies conferred upon 'persons' by statute, if they come within the equities of such statute. Thus they are deemed 'persons' under a statute imposing taxes upon 'persons.' So within the statutes relating to usury, of limitations, and penal statutes; and generally it may be said that they are treated as persons under all statutes, except when, from the sense in which the term is used, it is evident that it was not intended to apply to them. Strictly speaking, a corporation has no legal existence outside the State creating it; but by courtesy they are permitted

to discharge their functions in other States, subject, however, to such reasonable restrictions as such sovereignty may see fit to impose. In the case of a railroad corporation whose road extends through two or more States, although incorporated and known in both by the same name, and opperated by one set of officers, as it owes its corperate existance to, and exercises its franchises in each State, *is in each State a separate corporation*, a legal entity, so to speak, and subject to the legislative control of each State, to the extent that its road exists in each State, although the same corporation may compose both entities. In other words, *it is a separate corporation in each State, and subject to the laws of each State within the respective jurisdiciions*, however those laws may conflict as to the operation of the road; and it is not believed that the several States could, if they would, abandon their jurisdiction and control over that portion of the road erected within its limits, by a corporation deriving its existence, powers, and privileges from its laws; but it might, undoubtedly, authorize such corporation to establish its principal office, and exercies its corporate functions in another State, as it would, in the case of long lines of railways extending through several States, under one management, be impracticable for the corporation to maintain a principal office in each State; and the maintenance of such principal office outside the limits of the State does not interfere with the jurisdiction or control of each State, over that portion of the road existing within its borders. But where a railroad corporation is created by the laws of one State with authority to construct a railroad within its bordsrs, and into or through another State, while the act creating the corporation is operative to give it vitality and corporate power, yet it does not, of course, give it any authority to take lands, etc., in such other State for the construction of its road; *yet, if such other State recognizes it as a corporation, and to further its objects, confers upon it the necessary authority to take lands, etc., for the construction of its road, without attempting to reincorporate it in such State, it does not thereby become a new corporation in such State, but is a domestic corporation in the State creating it, and a foreign corporation in the other State*, which has not endowed with corporate life, but merely conferred upon it authority to exercise its corporate functions, with which it was previously invested, within its jurisdiction."

Idem, pp. 31-35.

"So a foreign corporation, so far as it exercises its franchises in another State, is subject to its control. Thus, although the Erie Railroad Company is a foreign corporation, it is at the same time domestic, to the full extent of the powers and franchises confirmed and invested in it, in New Jer-

sey, and in an action *qui tam*, etc., against it for taking unlawful tolls on parts of its lines in New Jersey, the company may properly be considered as a corporation of that State, and amenable as such to the provisions of the statute respecting unlawful tolls."

Idem, p. 578.

We further contend that doing business in this State under its laws, renders the corporation liable and subject to the revenue laws of the State. This position is fully covered by the case of Erie Railway Company *v.* Pennsylvania, 21 Wallace, 492.

"Construing together the seventh and eighth sections of the act, it is enacted 'that every railroad company, steamboat company, etc., now or hereafter doing business in this State, and upon whose works freight may be transported, whether by such company or by individuals', etc., shall be liable to the tax in question.

"It can scarcely be doubted that this company is doing business in the State of Pennsylvania when it receives gross earnings to an amount exceeding nine millions per annum for transportation over its road, of which forty-two miles lie within that State. The statute does not limit the amount of business done, or the length of road upon which it is done, as fixing its liability to taxation. The legal effect of the appellant's argument would be the same if four hundred and thirteen miles of its road were within the limits of the State of Pennsylvania and forty-two miles only were in the State of New York, instead of lying as it now does.

"We see no such difficulty in the machinery for the collection of the tax as should make us doubt the intention of the legislature. That, in fact, the State at once proceeded to, and has constantly persisted in, its exercise affords strong evidence of its intention and of its understanding of its effect.

"If it intended to impose the tax, and had the power to do it, the extent and the proportion to which it is carried belongs to the judgment and discretion of the State only. It is beyond our examination.

"That it has the power to enforce the tax by direct action upon that part of the road within its territory would seem to be reasonably certain, and that it would attempt to lay taxation to an extravagant or oppressive extent has not yet appeared. That it has exercised less than the full extent of its power, and has apportioned the tax according to the length of the road within the State, is not a just subject of complaint by the company."

In Paul *v.* Virginia, 8 Wallace, 868, Mr. Justice Field said as to foreign corporations doing business in this State:

"Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

And again, Mr. Justice Blatchford, in Fire Association *v.* New York, 119 U. S. 110, says:

"This Pennsylvania corporation came into the State of New York to do business by consent of the State under this act of 1853, with a license granted for a year, and has received such license annually, to run for a year. It is within the State for any given year under such license, and subject to the conditions prescribed by statute. The State having the power to exclude entirely, has the power to change the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax, or a further tax, as a license fee. * * * * Therefore the corporation was at all times, after 1872, subject, as a preprequisite to its power to do business in New York, to the same license fee its own State might thereafter impose on New York companies doing business in Pennsylvania. By going into the State of New York in 1872, it assented to such prerequisite as a condition of its admission within the jurisdiction of New York.

See also Hare's American Constitutional Law, Vol. II, pp. 666, 667:

"It has been decided on like grounds that the enumeration of particular burdens or restrictions in a charter, as those to which the company is or may be subjected, will not preclude the State or a municipal corporation from imposing others which fall within the scope of its general powers, and are legitimate if they do not contravene the constitutional prohibition. A statute imposing a tax of eight per cent. on each yearly dividend of the banks which it incorporates, will be interpreted as meaning that they shall pay so much, and not that the rate shall not be increased by future legislation. So the incorporation of a railway company with authority to pass through a city, subject 'to such regulations as may be required for paving, repairing, and cul-

verting the streets,' will not preclude the city councils from exacting an annual license fee of thirty dollars for each car and prescribing the charges for the conveyance of passengers. '*Expresio unius exclusio est alterius* is not', said Sharswood, J., 'the rule of construction applicable to charters.'"

From these citations it plainly appears that this company, having valuntarily obtained a right to do business in the State of Pennsylvania, and actually doing the same to a very large amount, places itself under the revenue laws of the Commonwealth of Pennsylvania, and it should bear its proportionate share of the burdens imposed upon it in common with all other corporations domestic or foreign, within the State. The legislature surely has this right to impose this condition upon this company and it has generally exercised that right against all corporations within the State. This corporation obeys this law so far as making its report to the Auditor General of the State is concerned, and it might as well protest against the right to require a report and refuse to make it as to contest the right of the State to impose the other condition upon it or retaining the tax from the resident bondholder of the State.

We print in appendix A, page —, the opinion of the Supreme Court of Pennsylvania rendered in this case. Justice Clark, who delivered the opinion of the court, has entered into a very full and complete discussion of the question that is before the court in this case, and we respectfully refer your Honorable Court to that opinion, which cites several authorities not cited in this argument, and we also refer to his cogent reasoning bearing upon the legal question involved and the legislative right to require the condition in controversy in this case of any foreign corporation doing business within the State.

This question is an important one to the Commonwealth of Pennsylvania. If it is unconstitutional to require this condition to be performed by the treasurer of a foreign corporation, it is equally unconstitutional to require any of these corporations to make a report to the accounting officers of the Commonwealth at all, as the report is only made for the purposes of taxation. If this right is denied to the Commonwealth of Pennsylvania, it would be an impossibility for it

to reach the resident bondholders of the State for purposes of taxation, as required by the Act of Assembly.

Hundreds of thousands—millions of dollars of personal property, held by residents of this State and taxable at the domicile of its owners would entirely escape taxation. The bonds of corporations chartered or doing business under the laws of Pennsylvania are easily concealed from the taxing authority. The return of them by the corporation issuing them and the deduction by it of the tax from the interest paid, has been found to be the most certain and equitable way of assessing and collecting such tax. This method has been approved by the State and Federal courts. To cripple the system by withdrawing from its operation the bonds of a foreign corporation, accepting our laws, doing business under their protection and making reports to our Auditor General, would have a tendency to impel our own citizens to make investments which they could thus shield from taxation. One class of personal property held by citizens of Pennsylvania would escape taxation, and another class would be subject to it, and have a double burden cast upon it. Frequently inequality and uncertanty would ensue where there have been equalization of assessment and certainty of collection. And this is not asked for by those who pay the tax, but by a corporation which is simply made the collector of it, and is paid for the collection! If such a corporation cannot be subjected to such a duty by the sovereign and State under which alone it can exercise any privilege in our Commonwealth, what power is left to restrain or regulate it?

This question not only concerns the New York, Lake Erie and Western Railroad Company, in its relation to the Commonwealth, and the small amount of money here involved, but it also concerns a large number of foreign corporations doing business within the State of Pennsylvania, and materially affects the revenues and taxing power of this Commonwealth.

We, therefore, most earnestly contend on behalf of the Commonwealth that the judgment rendered in this case should be affirmed.

JAMES A. STRANAHAN,
Deputy Attorney General.
W. U. HENSEL,
Attorney General.
For the Commonwealth of Pennsylvania. Defendant in Error.

APPENDIX "A."

THE OPINION OF THE SUPREME COURT OF PENNSYLVANIA.

The unanimous opinion of the Supreme Court of Pennsylvania in this case was well-considered. It was delivered by the late Justice Clark, and we reprint it, with the syllabus, in full:

COM. *v.* N. Y. & WESTERN R. R. CO., 129 PA., 463.

SYLLABUS.

1. Section 4, act of June 30, 1885, P. L. 193, requiring corporations, upon the payment of interest upon their corporate indebtedness, to deduct and return the State tax imposed, applies not only to domestic corporations, but to foreign corporations doing business in this State.

2. A corporation of one State cannot do business in another State without the latter's consent, express or implied. and that consent may be accompanied with such conditions as the latter may impose, not unconstitutional in character and effect and inconsistent with jurisdictional authority.

3. It is competent for the Legislature of Pennsylvania, to impose upon foreign corporations doing business in this State, the duty, upon the payment of interest upon their corporate bonds held by resident holders, to deduct and return the State tax imposed by section 4, act of June 30, 1885, P. L. 193.

4. The New York, L. E. & W. R. Co. is not relieved from this duty to collect and return said tax, or from liability therefor upon failure to perform such duty, by anything authorized, conferred, or required in the acts of February 16, 1841, P. L. 28, and March 26, 1846, P. L. 179.

5. Other questions, relating to the constitutionality, etc., of said act of June 30, 1885, P. L. 183, are ruled by *Commonwealth* v. *Delaware Div. Canal Co.*, *123 Pa.*, *594*, and the appeals in *Commonwealth* v. *Lehigh V. R. Co.*, *ante*, *429*.

OPINION.

Mr. Justice Clark:

This case came into the Common Pleas of Dauphin county upon an appeal from a settlement made by the Auditor General, etc., for State taxes on corporate loans, under the fourth

section of the act of June 30, 1885, for the year 1887. It was tried by the court by agreement of the parties under the act of 1874. The learned judge of the court below found as matter of fact that $2,378,000 of the company's bonds were owned and possessed by residents of Pennsylvania, of which $852,000 were held by individuals, and the residue by corporations. The principal questions raised on this record are ruled by Commonwealth *v.* Delaware Div. Canal Co., 123 Pa., 594; Lehigh Valley R. Co. *v.* Commonwealth and Commonwealth *v.* Lehigh Valley R. Co., the last two cases decided at this term and not yet reported (*ante 429.*) The only remaining question for our consideration is, whether or not the defendant company, being a foreign corporation, is liable to be charged with State taxes at the rate of three mills on the dollar on their bonds held by individuals and firms resident within the State, as above stated.

The New York, Lake Erie and Western Railroad Company is a corporation of the State of New York. It was originally incorporated in the year 1832, as the New York and Erie Railroad Company, with power to construct a railroad from the city of New York to Lake Erie, through the southern counties of the State of New York. To avoid certain engineering difficulties, the company was afterwards authorized by the Legislature of Pennsylvania, under certain restrictions, to build a specific portion of its road through the counties of Pike and Susquehanna, in this State: Acts of February 16, 1841, P. L. 28, and March 26, 1846, P. L. 179; the said company, by the act of 1846, being required to pay to the State of Pennsylvania, after the completion of the road, the sum of $10,000 annually. The property and franchises of the New York and Erie Railroad Company afterwards became vested in the Erie Railway Company, and in 1878, in the New York, Erie and Western Railroad Company. A portion of the defendant's road was made and is still maintained within the limits of this State, and since the completion and equipment of the road regular payment has been made by the company to the Commonwealth of the said sum of $10,000 annually, pursuant to the provisions of the several acts of Assembly already referred to. Although a corporation of another State, and therefore,

a foreign corporation, the company is doing business in this State. By a certificate filed in the office of the Secretary of the Commonwealth, pursuant to the act of 22d April, 1874, the defendant have designated a place of business and an agent to represent them; they are, therefore, not only duly authorized but, in the operation of their road they are actually engaged in doing business within the limits of this State.

The fourth section of the act of 1885 applies not only to all private corporations, created by and under the laws of this State or of the United States, but to such as are doing business in this Commonwealth. The several questions raised by the assignments of error, from the first to the ninth, inclusive, as we have already said, have been discussed and decided in the case of Commonwealth *v.* Delaware Div. Canal Company, 123 Pa., 594, and the case of Commonwealth *v.* The Lehigh Valley Railroad Company, argued at the present term (ante, 429), and will not be further considered here.

The only questions raised by the remaining assignments are, first, whether the provision of the fourth section of the act of 1885, so far as it applies to foreign corporations doing business in this State, is a proper exercise of legislative power; and, second, assuming this to be so, whether there is anything in the said provision by which the defendant road was permitted to pass through the counties of Pike and Susquehanna, which would exempt the company from the obligation of this act.

Upon the first question suggested there can, we think, be but little room for discussion. In the Delaware Div. Canal Company case, already referred to, we said :

"Foreign corporations, exercising their franchises under the laws of other States and counties, are beyond the reach of our processes of taxation. We could not require them ordinarily to comply with any such regulation of our law, and, therefore, they are necessarily excluded from the provisions of the act. Such foreign corporations as are engaged in business in the State might, doubtless, be required to comply as a condition of their right so to do, but this could only embarrass the action of the local assessor, and upon this ground, doubtless, they were wisely excluded from the operation of the act."

The last member of the concluding sentence of the paragraph quoted is a mere inadvertance. The fourth section of the act of 1885 does in terms embrace such foreign corporations as are engaged in business in this State, and the question now to be considered is, whether or not such a provision as respects the New York, Lake Erie and Western Railroad Company is a proper exercise of the legislative power of the State. The general statement that foreign corporations are ordinarily beyond the reach of our processes of taxation is undoubtly correct, but when a foreign corporation comes into Pennsylvania and engages in business here, undoubtedly it does so subject to the general policy of, and the course of legislation in the State: Runyon *v.* Coster, 14 Pet., 127. A foreign corporation can exercise its franchises in Pennsylvania only so far as it may be permitted by the local sovereign. The right rests wholly in the comity of the States: Paul *v.* Virginia, 8 Wall., 168. A corporation of one State cannot do business in another State without the latter's consent, express or implied, and that consent may be accompanied with such conditions as the latter may think proper to impose: St. Clair *v.* Cox, 106 U. S., 350. These conditions will be valid and effectual, provided they are not repugnant to the constitution or laws of the United States, inconsistant with the jurisdictional authority of the State, or in conflict with the rule which forbids condemnation without opportunity for defense: Layfayette Insurance Co. *v.* French, 18 How., 404, Doyle *v.* Insurance Co., 94 U. S. 535; Pembina Mfg. Co. *v.* Pennsylvania, 125 U. S., 181.

It was competant for the Legislature of Pennsylvania to impose a condition upon foreign corporations doing business in this State that they shall assess and collect the tax upon that portion of their loans in the hands of individuals resident within this State, and otherwise comply with the provisions of the act of 1885. The act imposes no tax upon the company; it simply defines a duty to be performed and fixes a penalty for disregard of that duty. The Legislature having so provided, compliance with the act may, in some sense, be said to form one of the conditions upon which corporations may do business within the State, and the corpo-

ration continuing its business subsequently would be taken to have assented thereto.

There is, however, a condition, implied even in the case of domestic corporations, that they will be subject to such reasonable regulations, in respect to the general conduct of their affairs, as the Legislature may from time to time prescribe, and such as do not materially interfere with or obstruct the substantial enjoyment of the privileges the State has granted: Chicago *v.* Needles, 113 U. S., 574. If this be so as to corporations who are entitled to their charter privileges upon the footing of a contract, how much the more is it so as to corporations who are merely permitted by the Legislature to do business within this State as a matter of grace and not of right? But it is said that the enforcement of the fourth section of the act of 1885 against the defendant corporation would impair the obligation of the contract existing between the Commonwealth and the company, as set forth in the private statutes of 1841 and 1846 already referred to. Apart from these statutes the defendant had the right by the comity of the States to contract and to sue within the State of Pennsylvania, but could exercise no extraordinary franchises or special privileges granted by the State incorporating it, as, for instance, the right of eminent domain, or the privilege of exemption from taxation: State *v.* Boston, etc., R. Co., 25 Vt., 433; Middle Bridge Co. *v.* Marks, 26 Me., 326; Taylor on Corp., 386. It was for the exercise of this extraordinary privilege and power of the State, the annual payment of $10,000 was stipulated. There is nothing in the act to indicate that this sum was paid in lieu of taxes, or for exemption from any duty which might otherwise be imposed upon the company, but for the privilege of exercising the right of eminent domain in the location of their road through the counties mentioned, under restrictions particularly specified. The effect of these acts of 1841 and 1846 was not to declare the company a corporation of the Commonwealth, but, as Mr. Justice Thompson said in New York & Erie R. Co. *v.* Young, 33 Pa., 175, "for the purposes of these acts the rights involved are to be tested and judged by the same rules of law as if the company had been primarily incorporated by this Commonwealth. So far

as the road runs through this State under the privileges granted to it, the company is a *quasi* Pennsylvania corporation. The right of eminent domain, within the restrictions of the grant, was as fully conferred on them by the act of February 16, 1841, as it ever is conferred on corporations exclusively within the State, and their rights and duties under the privileges granted must be ruled by the same principles." One State may make a corporation of another State, as there organized and conducted, a corporation of its own, *quoad* property within its territoral jurisdiction: Railroad Co. *v.* Harris, 12 Wall., 65–82; Graham *v.* Railroad Co., 118 Pa. (?), 168. Thus it will be seen that the defendant exercises powers and franchises which they have received directly from the legislation of Pennsylvania; that a part of their property is actually within the limits of this State, and receives the protection of our laws, and there is no good reason why the company should not be held subject to the same regulations as corporations of our own State. We are of opinion that on this branch of the case the Court was right.

The judgment is affirmed.

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JAMES H. McKENN
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153-628

IN THE

Supreme Court of the United States.

Nos. 75, 79, and 591, OCTOBER TERM, 1893.

New York, Lake Erie and Western Railroad Company,

PLAINTIFF IN ERROR,

vs.

Commonwealth of Pennsylvania.

Reply to Argument of Commonwealth of Pennsylvania.

M. E. OLMSTED,
Attorney for Plaintiff in Error.

In the Supreme Court of the United States.

Nos. 75, 79, and 591, OCTOBER TERM, 1893.

NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY,
Plaintiff in Error,

vs.

COMMONWEALTH OF PENNSYLVANIA.

REPLY TO ARGUMENT OF THE COMMONWEALTH OF PENNSYLVANIA.

For the past half century or more, Pennsylvania has taxed all bonds, mortgages, &c., owned by residents within her borders. Until 1864 this tax was assessed and collected only through the ordinary agencies of local assessors and collectors in the districts in which the taxable persons resided. Under the revenue statutes of 1864, 1868, 1879, 1881 and 1885, the State has been endeavoring, with varying success, to require her own domestic corporations to perform for her the duty of assessing and collecting the tax, so far as applied to bonds issued by them, and taxable in the hands of resident owners within the State. Except in two instances she has never attempted to enforce this duty upon foreign corporations. Her first attempt was in the case of the Delaware and Hudson Canal Company, a corporation of the State of New York, whose relations to the State of Pennsylvania

are almost identical with those of the Erie Company, a portion of its canal having been built within the State, under authority of a special act of Assembly. When the case reached the Dauphin County Court, in which all the Commonwealth's revenue cases originate, the venerable Judge Pearson, who had for thirty years presided over that Court, said:

"This case has at least the recommendation of novelty, if it has no other. It is an endeavor, under a law of Pennsylvania, to compel a corporation of the State of New York to become the tax collector for the former State from its citizens dwelling within its own borders. . . . . The Legislature of this State possesses no control whatever over a New York corporation. . . . . There is no foundation whatever for the claim. We, therefore, find in favor of the defendant."

The then Attorney General acquiesced in this decision, and no appeal was taken to the Supreme Court of Pennsylvania. No further attempt of this kind was made against any foreign corporation until the three suits now at bar were brought against the Erie Company.

Bonds, mortgages, &c., not issued by domestic corporations, have always been assessed and taxed through the agencies above indicated, and for such assessment and taxation the State's revenue laws provide a most complete and thorough system. Each taxable inhabitant is furnished with a blank form and is required, under oath, to make return to the local assessor of his various investments. In addition to this, the recorders and prothonotaries in the various counties are also required to return to the local authorities all mortgages, judgments, &c. Whenever the assessor is dissatisfied with the return of any taxable he may estimate an assessment against the taxable and add fifty per cent. to the amount of his taxes, from which estimate and taxation the taxable is not permitted any appeal, except upon condition of his making a report which shall be satisfactory to the county commissioners, who in turn report to a State Board, composed

of the Auditor General, State Treasurer and Secretary of the Commonwealth. The bonds of foreign corporations owned in Pennsylvania have always been taxed in this manner and with great success. Thus in 1892, as shown on page 1 of the published report of the Auditor General, the total tax upon bonds collected through the agency of domestic corporations was $682,747, while the State tax collected by the local assessors and collectors upon bonds and mortgages not issued by domestic corporations, but owned by residents, of Pennsylvania, amounted to $2,235,838.46. In *Com.* v. *Delaware Division Canal Co., 123 Pa., 594*, the liability of foreign corporations was not directly involved, but Mr. Justice Clark, who delivered the opinion of the Court, said:

"Foreign corporations exercising their rights and franchises under the laws of other States and countries are beyond the reach of our process of taxation. We could not require them ordinarily to comply with any such regulation of our law, and therefore they are necessarily excluded from the provisions of the act. Such foreign corporations as are engaged in business in this State might doubtless be required to comply as a condition of their right to do so, but this could only embarrass the action of the local assessor."

It will, therefore, be seen that the learned jurist differed from the learned counsel for the Commonwealth as to the importance of forcing this duty upon foreign corporations. He thought, and rightly so, that as to bonds issued by foreign corporations any attempt at assessment and collection through the officers of the company would be an embarrassment rather than an assistance to the State in the collection of her revenues. Under her present system of local assessment and collection there is no reason why, if the State's officers enforce her own laws, a single bond issued by a foreign corporation, but owned in Pennsylvania, shall escape taxation. Indeed, it is quite possible that the $841,000 of bonds issued by the Erie Company were, if owned in

Pennsylvania in 1888, as contended, actually assessed and taxed in the hands of the holders in the taxing districts in which they reside.

The question here, however, is not as to the policy, but the power of Pennsylvania to impose upon a foreign corporation and its non-resident treasurer the performance of impossible duties or the payment of a heavy penalty for non-performance. The impossibility of performance does not rest upon the argument of counsel, but in the judicial finding of fact by the trial court, which has all the binding force of the verdict of a jury and is not reviewable on appeal. The company cannot here dispute the finding of fact that $841,000 of bonds issued by it were, in 1888, owned by residents of Pennsylvania. That finding of fact is binding upon the company. The court does not find, however, at what time in that year the bonds were so held, nor by what residents of that State. The Commonwealth is equally bound by the statement in the fourth finding of fact "that it is practically impossible for the treasurer or other officers of defendant, at the time the coupons are presented, to ascertain the residence of the owners of the bonds from which they have been separated," and for reasons which are further stated in the said finding. But it is at the time of the presentation of the coupons—at the payment of the interest—that the duties required by the act of 1885 are to be performed.

That this Company is a foreign corporation as to Pennsylvania is clearly shown by the authorities cited by her learned law officers in support of the contrary proposition. The act of April 22, 1874, (P. L. 108), compliance with which they mention, refers only to foreign corporations. Their citations from Wood's Railway Law show clearly that the domicile of the corporation is in the State under whose laws it was created. A corporation created under the laws of two States, as in the case of the merger of a New York corporation with a Pennsylvania corporation, may indeed be

held to be a separate corporation in each State. But that is not the condition here. This case is accurately described in the following portion of the Commonwealth's long citation from Wood's Railway Law, the italics being those found in the Commonwealth's paper book:

"Where a railroad corporation is created by the laws of one State with authority to construct a railroad within its borders, and into and through another State, while the act creating the corporation is operative to give it vitality and corporate power, yet it does not of course give it any authority to take lands, etc., in such other State for the construction of its road; *yet if such other State recognizes it as a corporation, and to further its objects, confers upon it the necessary authority to take lands, etc., for the construction of its road, without attempting to reincorporate it in such State, it does not thereby become a new corporation in such State, but is a domestic corporation in the State creating it, and a foreign corporation in the other State.*

In *Com. of Pa.* vs. *N. Y., L. E. & W. R. R. Co., 114 Pa., 340,* the Commonwealth of Pennsylvania, by her Attorney General, proceeded against this company, directly alleging it to be a foreign corporation, and that coal lands held by it were therefore subject to escheat under the Pennsylvania statute of 1855, forbidding the holding of real estate by foreign corporations, and the point was sustained by the Court. In a later case it was found that the lands were not owned by the railway company, and therefore they were not escheated. But that if held by it they would be escheated was conceded.

Some suggestion is thrown out in the Commonwealth's argument as to roads of other companies alleged to be now operated by the Erie Company under lease. No question of that kind is raised by this record, or any of these three records, which relate entirely to the conditions existing in 1886, 1887 and 1888.

In any event the operation of a domestic road by a foreign corporation would not give the State control or regulation over any more than related to the domestic road. The

Pennsylvania Railroad Company leases and operates railroads in a dozen different States. But that does not give each of those States the right to dictate the terms upon which the company shall pay interest in Pennsylvania upon bonds issued in Pennsylania under authority of her laws. It can hardly be pretended that the laws of each of those dozen States enter into and form part of the obligation of the contract of bonds issued in Pennsylvania before the leases were made. It will be time enough, however, to discuss that question further when if ever it shall be raised and presented for decision.

Even if it may be considered domestic as to the franchises conferred by and exercised within the State of Pennsylvania and the business which it there transacts, it is nevertheless foreign as to the borrowing of money, issuance of bonds and payment of interest. All those thing were and are done in New York under authority of the laws of, and in pursuance of contracts made and performable in, that State. The fact that some of its negotiable bonds may have come into the ownership of residents of Pennsylvania does not domesticate the corporation as to those bonds any more than the holding of a Bank of England note by a resident of Pennsylvania would constitute the Bank of England a domestic corporation in that State.

All that is decided in *Erie Railway Company* vs. *Pennsylsytvania, 21 Wallace, 492*, is that the company in the operation of its road in Pennsylvania was "doing business" within that State within the meaning of the taxing statute then in controversy, and that the right of Pennsylvania to tax the property and business of the company within the State was not surrendered by the acts of 1841 and 1846, in pursuance of which the company constructed a portion of its works within the State. But the effort here is not to tax property or business of the company in Pennsylvania. On the contrary it is to compel the company to perform certain duties in New York—duties which do not relate in any way

to the taxation of any property or business of the company, but to the taxation of property owned by individuals residing in Pennsylvania who happen to be creditors of the company. It is an attempt to regulate and interfere with the company in its performance in New York of contracts made, and by their terms performable and enforceable, there.

There is nothing in the contention of the ~~defendant~~ plaintiff in error at variance with *Paul* v. *Virginia*, 8 *Wall.*, *168*, nor with *Fire Association* v. *New York*, *119 U. S.*, *110*. Conceding that Pennsylvania had at the outset the right to impose such conditions as she thought fit upon the construction by by this foreign corporation of a portion of its line within her limits, the fact is that she did impose such conditions which were accepted and have been in every respect complied with by the company. The question now is as to the right of the Commonwealth to impose new conditions neither expressed nor implied in the original grant. In the case last cited, the Fire Association was doing business in New York under a statute which required it to obtain an annual license from year to year. The statute prescribed a certain license fee, but provided in effect that if the State in which the company was chartered at any time imposed a greater license fee upon New York corporations, then the Fire Association or any other corporation of the State so imposing such higher license fee should pay in New York the same license fee which the other State required of New York corporations. The Fire Association was a Pennsylvania corporation. The State of Pennsylvania passed a law requiring from New York and other foreign corporations a higher license fee. For a year subsequent to that in which the Pennsylvania statute was passed, New York required from the Fire Association a license fee equal to that imposed by the Pennsylvania statute, and in so doing was sustained by this Court, Mr. Justice Harlan dissenting. The question, however, presented for the determination of this Court was whether or not, in requiring from the Fire Association

a higher license fee than it required from other similar corporations, the State of New York had denied to the association "the equal protection of the laws," in violation of a clause in the fourteenth Amendment to the Constitution of the United States.

It was admitted and conceded throughout the argument and in the opinion of Mr. Justice Blatchford that the payment of such higher license fee was one of the conditions expressed in the act of Assembly under which the Fire Association had entered the State of New York for the purpose of doing business there. This court held that the State had the right to impose such conditions upon its assent to the doing of business by the Association, the said business not being a transaction of commerce, and that the said condition was not a denial of "the equal protection of the laws." The distinction between that case and the one at bar is three-fold: First, the condition now sought to be imposed upon the Erie Company is not contained among the provisions upon which the assent of the State was granted. Second, the business upon which the condition is sought to be imposed is inter-State commerce. Third, the conditions are such as to impair the obligation of contracts in which third parties are concerned. This court has never held that in a case where a State has given her consent to a foreign corporation, which upon the faith thereof has invested a large amount of money in permanent improvements thereunder, such consent may be withdrawn or the conditions thereof subsequently made more burdensome.

The citation by the Attorney General from Hare's American Constitutional Law, to the effect that the numerous burdens or restrictions in a charter "will not preclude the State or municipal corporation from imposing others which fall within the scope of its general powers, and are legitimate if they do not contravene the constitutional prohibition," is not applicable. The statement was made with reference to charters of domestic corporations. Furthermore, the obli-

gations here sought to be imposed by the State of Pennsylvania do not "fall within the scope of its general powers," and they do "contravene the constitutional prohibition." They impair the obligation of contracts and they interfere with the transaction of inter-State commerce, which, as found by the trial court, constitutes the chief business of the company in Pennsylvania.

If the obligation sought to be enforced upon this company is to be construed as one of the conditions for the construction of the road within the State, the contract contained in the acts of 1841 and 1846 is violated. If intended as a condition upon which the company may continue to do business upon the railroad constructed in pursuance of assent previously given, then, that being inter-State commerce, the condition is void as a regulation thereof.

In any event, as the requirement of the Pennsylvania statute of 1885 is, in so far as it applies to this company, intended to be extra-territorial in its operation, and its necessary effect is to vary the terms of contracts made and performable in and under the laws of the State of New York, it cannot be enforced.

Bell's Gap R. R. Co. v. *Penna., 134 U. S., 232*, cited by counsel for the Commonwealth, is not in point. In that case the Commonwealth was dealing with her own corporation, brought into existence by her own laws, and in respect of bonds issued in pursuance thereof to persons residing within her limits. The company was there, the bond was there, the taxable owner was there, the contract was performable and enforceable there. The interest was payable and actually paid there. The fund from which the tax was to be deducted was there. All the persons and all the things affected were within the State. That case involved no question of extra-territorial jurisdiction, no question of the impairment of the obligation of any contract, but simply the constitutionality of the tax itself, which was claimed to be in violation of the fourteenth Amendment to the Federal Con-

stitution, because of its inequality and injustice, by reason of being levied upon the par value of the bonds and not upon their actual value, and that without notice to the owner or the right of appeal. None of the questions which the Court is here called upon to decide were raised by the record or even hinted at in the opinion of the Court in the Bell's Gap case.

M. E. OLMSTED,
Attorney for Plaintiff in Error.